83-1986
No.

Office - Supreme Court, U.S.
FILED
JUN 4 1984
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1983

HAROLD HAIMOWITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Did Congress intend the mail fraud statute, 18 U.S.C. §1341, to extend to an alleged scheme to defraud where the only mailings were intragovernmental mailings between two branches of a single department of a state government?

II. Can a defendant be compelled to announce his intent to raise the defense of entrapment prior to the close of the government's case where, in a bench trial, the trial court has ruled that the defendant admits the acts upon which the prosecution is based by interposing that defense?

III. Can a lawyer be convicted of participation in a scheme to defraud where the essence of the alleged fraud is assisting a client to establish a corporation, and assisting that corporation to obtain a transfer of an existing liquor license, where the corporation is established because the individual himself may be statutorily disqualified from holding a liquor license?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

In addition to the Petitioner Harold Haimowitz and the Respondent, United States of America, Dan Scarborough and George L. Onett were parties to the proceedings in the Court of Appeals for the Eleventh Circuit.

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The opinion of the Court of Appeals for the Eleventh Circuit is reported at __ F.2d __ (11th Cir. 1984), and is reproduced in the Appendix at A-1. The findings of fact and conclusions of law of the United States District Court for the Middle District of Florida are unreported, but are reproduced in the Appendix at A-101.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1984. That Court denied a Petition for Rehearing and Suggestion for Rehearing en Banc by Order dated April 6, 1984. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The federal mail fraud statute, 18 U.S.C. §1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any mattter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner, who is a Jacksonville attorney, and three co-defendants were tried at a bench trial on an indictment charging conspiracy to commit mail fraud and mail fraud, in violation of 18 U.S.C. §§371 and 1341; and conspiracy to obstruct, attempt to obstruct, and obstruction of interstate commerce by extortion, in violation of 18 U.S.C. §1951. The charges involved an alleged fraudulent scheme to secure the transfer of a Florida State liquor license to Abbott's Restaurant, Inc., and the alleged extortion of Peter Abbott under color of official right and through fear of economic loss.

Petitioner assisted Peter Abbott in acquiring a restaurant; set up a corporation, Abbott's Restaurant, Inc.,

the shares of which were owned by Mrs. Peter Abbott; and sought the transfer of a liquor license to the corporation.

The government claimed that in papers submitted to the Beverage Department of the State of Florida in order to secure the license transfer, misrepresentations were made with respect to Peter Abbott's involvement in Abbott's Restaurant, Inc. Although the Florida statutes regulating alcoholic beverage licenses provide that licenses can be issued only to corporations whose officers are of good moral character, and although there was no dispute that Peter Abbott was not an officer of Abbott's Restaurant, Inc., and owned none of the shares of the corporation, the trial court found that Haimowitz had misrepresented to, and concealed from, the Beverage Department

facts relating to Peter Abbott's ownership interest in Abbott's Restaurant, Inc., Peter Abbott's criminal record the source and amounts of monies invested in the restaurant, and the status of Peter Abbott's marital relationship. The crux of the district court's determination was its finding that Peter Abbott was the "owner in fact" of the restaurant and that Haimowitz knew that when he prepared the license transfer applications which disclosed no ownership interest on the part of Peter Abbott.

The extortion charges involved claims that Haimowitz had forced Peter Abbott through fear of economic loss and/or under color of official right to pay co-defendant Onett, also an attorney, $15,000 in order to obtain

the license and that co-defendant Dan Scarborough, a state senator, was a participant in the scheme to extort.[1]

Virtually the entire case against the Petitioner rested on the testimony of Peter Abbott, an informant with a long history of criminal frauds to his credit, including one strikingly parallel to the case at bar in which he attempted to blame his Massachusetts attorneys for a scam in which he was engaged.

Haimowitz, who testified on his own behalf, maintained that the representations which he made to the Beverage Department were based on what Peter Abbott had told him and were not known to him to be false.

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[1] The fourth defendant, another attorney, was acquitted of all charges.

The trial judge, who noted in his findings of fact that he placed no stock in the truthfulness of Abbott's testimony "except when the truth was obvious," nevertheless found Petitioner guilty of conspiracy to commit mail fraud, four substantive counts of mail fraud, conspiracy to extort, extortion, and attempted extortion. Each of the mail fraud convictions was based on mailings of the liquor license applications from the Jacksonville, Florida office of the Florida Beverage Department to the Tallahassee, Florida office of that state agency.

The Court of Appeals reversed Petitioner's conviction for attempted extortion, but affirmed the convictions on each other count. That Court summarily rejected Petitioner's claim that mail fraud convictions based

solely on intra-state, intra-agency mailings were beyond the reach of the federal mail fraud statute:

> This Court finds that the requirements of §1341 have been met. See Bannister v. United States, 379 F.2d 750 (5th Cir. 1967), cert. denied, 390 U.S. 927, 88 S.Ct. 861, 19 L.Ed.2d 988 (1968) (§1341 violations where office communications were mailed between a Jacksonville insurance agency and the home office in New York); Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) ("The crime of mail fraud is broad in scope").

United States v. Haimowitz, No. 82-3009 (Mar. 5, 1984), Slip Op. at 1937, n.9, reproduced at A-37.

The Court of Appeals also rejected Petitioner's claim that he was improperly forced to waive the defense of entrapment by the trial court's ruling directing that he announce his intention whether or not be would raise that defense prior to the prosecution's

resting. The Court of Appeals reasoned that, while the general rule is that a defendant who claims entrapment admits the acts upon which the prosecution is based, an exception exists where the government's own case-in-chief injects substantial evidence of entrapment into the case; that the trial court's ruling did not prevent Haimowitz from later raising entrapment but only forced him to elect whether to raise the defense on the evidence introduced in the government's case; and that the trial court "merely employed a procedural vehicle to ensure the orderly presentation of evidence." Id. at 1940, reproduced at A-52-53.

Finally, Haimowitz had argued that the essence of the scheme to defraud charged against him was that, in his capacity as a lawyer, he had assisted a

client in creating a "legal fiction," a corporation, to achieve an objective which his client might not otherwise have been able to achieve. Haimowitz argued that what he did was not fraud, but was instead the provision of mundane, unexceptional legal services wholly consistent with the discharge of professional responsibilities. The Court of Appeals summarily rejected this claim as well, noting in a footnote:

> This Court disagrees that an attorney's professional obligations require him to engage in crime with his client. Cf. United States v. Kelly, 569 F.2d 928 (5th Cir.), cert. denied, 439 U.S. 829 ... (1978); United States v. Gordon-Kikkar, 518 F.2d 972, 975 (5th Cir. 1975).

Id. at 1937, n.10, reproduced at A-39.

Haimowitz' petition for rehearing and suggestion for rehearing en banc was denied on April 6, 1984. (A-201)

REASONS FOR GRANTING THE WRIT

I. WHETHER CONGRESS INTENDED THE MAIL FRAUD STATUTE TO EXTEND TO SITUATIONS WHERE THE ONLY MAILINGS ARE BETWEEN DIFFERENT BRANCHES OF A SINGLE STATE AGENCY INVOLVES IMPORTANT QUESTIONS OF FEDERALISM AND THE LIMITS OF FEDERAL CRIMINAL JURISDICTION.

This case raises an important question concerning the reach of the mail fraud statute -- a concededly farreaching federal criminal statute. To the federal prosecutor, the utility of the statute rests in its historic ability to "evolve" over time so as to cover frauds in their myriad forms and the federal courts have, in general, recognized this somewhat elastic quality of the statute.

On the other hand, this Court has insisted that there are limits to the statute and that those limits be

respected. Thus, this Court has ruled that the mail fraud statute does not reach all frauds, but only those in which use of the mails is a part of the execution of the fraud, Parr v. United States, 363 U.S. 370 (1960); United States v. Maze, 414 U.S. 395 (1974), and only those where use of the mails is intended or reasonably foreseeable, Pereira v. United States, 347 U.S. 1 (1954).

There exists another general limitation on the statute's reach -- it cannot extend beyond the limits intended by Congress. Healy v. Ratta, 292 U.S. 263, 270 (1933); Kline v. Burke Construction Co., 260 U.S. 226, 233-34 (1922); United States v. Staszcuk, 502 F.2d 875, 880 (7th Cir. 1974), cert. denied, 423 U.S. 837

(1975); United States v. Kelem, 416 F.2d 346-47 (9th Cir. 1969), cert. denied, 397 U.S. 952 (1970).

It is well settled that, in ascertaining Congressional intent there is a presumption against construing a statute so as to significantly change the federal-state jurisdictional balance unless the authors of the legislation have clearly conveyed their meaning otherwise. United States v. Bass, 404 U.S. 336, 349 (1971); Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940).

In the instant case, the expansion of the mail fraud statute to cover intragovernmental mailings between units of the State Beverage Department directly implicates principles of federalism and readjusts the delicate federal-state balance. What this Court

wrote in Rewis v. United States, 401 U.S. 808, 812 (1971), with respect to efforts to expand federal jurisdiction under the Travel Act is pertinent:

> In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources and might well produce situations in which the geographic origins of customers, ~~a matter of~~ happenstance, would transform relatively minor state offenses into federal felonies.

Rewis' teaching is equally applicable here.

The regulation of alcoholic beverages is a classic state, not federal, function. See Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 41-42 (1966). There is little reason why limited federal police resources should be expended on conduct which the states should appropriately

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control and can effectively control.[2] In this case in particular, the legality of the conduct at issue was dependent on the construction of certain state regulations dealing with eligibility for a liquor license. A federal court is surely not in as good a position as a state tribunal to determine whether those regulations have been violated and whether the State and its citizens have been victims of a scheme to defraud.

Finally, the use of the United States mail in this case was a happenstance caused solely by the

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[2] The alleged victims of the alleged fraud were the Florida State Beverage Department and the citizens of Florida. Compare United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979) (scheme alleged to defraud not only state agency and citizens of a state, but U.S. Department of Health, Education & Welfare and citizens of the U.S.).

geographic origin of the liquor license applicant. The Jacksonville district office used the mails to transmit forms to the agency headquarters in Tallahassee. Had the district office been capable of processing the transfer application itself, had the applicant been closer to Tallahassee, or had the state used couriers or a private delivery service instead of the mails, the purely state matter would not have become a federal case.

II. THIS CASE PRESENTED A QUESTION ON WHICH THE CIRUCITS ARE DIVIDED -- WHETHER A DEFENDANT MAY CLAIM ENTRAPMENT YET DENY PARTICIPATION IN THE CRIME -- AND ALSO RAISES IMPORTANT QUESTIONS CONCERNING ORDER OF PROOF IN ENTRAPMENT CASES.

This petition also raises important questions of federal criminal procedure which arise in every case in which an entrapment defense may exist. It presents question on which the Circuits are not just split, but splintered: whether a defendant may claim entrapment and deny participation in the crime. See 8A Moore's Federal Practice, ¶ 26.04[4][b] at 26-64. In addition, and independent of that question, it raises a question concerning order of proof in cases in which an entrapment defense may be raised.

The district judge made plain his view that, in the Eleventh Circuit, a defendant who invokes the entrapment defense thereby admits the acts with which he is charged. He then ordered the defendants to disclose -- before the government rested -- whether they intended to raise the defense.

The government insisted that this was necessary so that, in the event the defendant did intend to argue entrapment, the prosecution could introduce predisposition evidence as part of its case-in-chief. The defendants argued that they should be able to hear the government's entire case, and have the government rest, before making that election. They indicated that they were certainly not prepared to raise entrapment if it

meant, in a bench trial, that in so doing they would be admitting the acts charged.

The district court's ruling amounted to a forced waiver of a substantial defense inconsistent with this Court's rulings in United States v. Russell, 411 U.S. 423 (1973), Sherman v. United States, 356 U.S. 369 (1958), and Sorrells v. United States, 287 U.S. 435 (1932). That ruling forced the Petitioner to choose between waiving the defense or admitting culpability and facing predisposition evidence as part of the government's case in chief. The Constitution's guarantee of due process does not tolerate giving a criminal defendant that Hobson's choice; the waiver was a forced one and invalid under Simmons v. United States, 390 U.S. 377, 393-94 (1968).

It has long been the rule in some Circuits that a defendant may not plead entrapment while denying the very acts upon which the prosecution is predicated. See United States v. Greenfield, 554 F.2d 179, 181 (5th Cir. 1977) (en banc), cert. denied, 439 U.S. 860 (1978). The rule, known as the Eastman rule in the Ninth Circuit [Eastman v. United States, 212 F.2d 320 (9th Cir. 1954)], is predicated on the notion that a defendant is not entitled to raise "inconsistent defenses." This rule has come under strong attack as in conflict with prevailing Supreme Court authority and detached from its theoretical moorings, United States v. Demma, 523 F.2d 981, 982 (9th Cir. 1975) (en banc). In Demma, the Ninth Circuit stated:

> As long as the Eastman "rule" lives, this circuit will be in conflict with Sorrells, Sherman and Russell; our internal law will be in disarray; and the constitutional issues will hover. No sound reason exists to perpetuate the Eastman aberration. We now overrule it, and we disapprove the cases in our circuit that have followed the Eastman rule. In harmonizing the law of the circuit with the rationale of Sorrells, Sherman, and Russell and eradicating our aberrant cases, we have no occasion to and we do not rest on constitutional grounds; on the contrary, our restatement of entrapment law in the circuit avoids the constitutional problems that lurked in the Eastman line of cases that we overturn today. Id. at 986.

Nevertheless, with several limited exceptions, the Eleventh Circuit follows that constitutionally suspect rule. See United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982).

In the case at bar the constitutional problems alluded to in Demma that "lurked in the Eastman line of cases" are clearly presented. The

defense of entrapment was conditioned "on the defendant's yielding his presumption of innocence, his right to remain silent and his right to have the Government prove the elements of the crime beyond a reasonable doubt." United States v. Demma, supra.

Indeed, the constitutional problems discussed in Demma and Greenfield were compounded because the election with its necessary concessions was required to be made prior to the Government's resting. Normally, of course, if the Government fails to produce sufficient evidence that the defendant committed the crime charged a motion for judgment of acquittal should be granted. The required concession would, it seems, preclude the granting of such a motion. Thus, to the extent that Greenfield, supra, rendered the rule requiring a

defendant to admit to the crime in order to raise the entrapment defense somewhat more flexible and less subject to constitutional challenge, the instant case, by requiring an early election, exacerbated the constitutional issue.

The ruling of the Court of Appeals recognizing an exception to the rule requiring admission of the culpable acts in cases where the defense is raised on evidence presented by the government in its case in chief does not solve this problem -- and certainly does not do so for this Petitioner. Indeed, the Court of Appeals reaffirmed the constitutionally suspect rule that a defendant who raises entrapment admits culpable acts. The exception which it carved out is of little comfort to the defendants who had to

make their decision on the basis of the law as the trial court had ruled and not that which the Court of Appeals would later make.

And, of course, the district court's ruling clearly required not that the defendants announce whether they would raise the defense on the government's evidence, but whether they would raise it at all. The Court of Appeals' suggestion to the contrary is not consistent with the record at all. In any event, it does not solve the underlying problem which is that a defendant should never have to admit culpable acts in order to raise entrapment.

Moreover, even if the question of admitting culpability or not admitting culpability were wholly eliminated -- that is, even if it had been clear that

a defendant need not admit the acts by raising entrapment -- the notion validated by the Court of Appeals -- that a defendant may be compelled to note whether he will plead entrapment before the government rests so that the government can introduce evidence of predisposition in its case in chief -- itself raises an important question of federal criminal procedure demanding of this Court's consideration. The Court of Appeals' announced justification -- insuring the orderly presentation of evidence -- surely does not suffice to justify the trial court's innovation.

Evidence of predisposition -- including, otherwise inadmissible evidence such as defendant's commission of similar criminal acts, see, e.g., United States v. Moschiano, 695 F.2d 236 (7th Cir. 1982), can surely wait

for rebuttal when its probative value can be evaluated in a more complete context.

The presentation of evidence would surely be no less orderly if the government were permitted to introduce rebuttal evidence on predisposition if the defendant introduces evidence of entrapment. And in the rare instance where the government's conduct is so egregious that its own proofs establish governmental manufacture of crime as a matter of law so that the defendant could successfully argue a Rule 29 motion for judgment of acquittal on the ground of entrapment, predisposition evidence should be irrelevant.

III. THE COURT OF APPEALS' RULING IMPLICITLY AND IMPROPERLY DECIDES, THROUGH THE CRIMINAL JUSTICE SYSTEM, SOME OF THE MOST DIFFICULT QUESTIONS OF ATTORNEYS' PROFESSIONAL RESPONSIBILITIES AND PROBABLY PLACES THE VAST MAJORITY OF PRACTICING ATTORNEYS IN THIS NATION AT RISK OF PROSECUTION FOR FRAUD.

Petitioner, acting in his capacity as lawyer, created a legal entity, Abbott's Restaurant, Inc., the stock of which was owned entirely by Jean Abbott, the wife of Peter Abbott. Whether the corporation was set up this way to provide for Jean Abbott in the event of a divorce, to put Peter Abbott's assets out of reach of his creditors, or because Peter Abbott's criminal record disqualified him from holding a liquor license, the creation of this corporation was wholly unexceptionable and entirely legal.

The government assumed at trial and on appeal that the creation by a lawyer of a "legal fiction" i.e., a corporation, is fraudulent if the purpose of creating the corporation is to allow a client to achieve an objective which the client could not otherwise achieve. The Court of Appeals in affirming the convictions also necessarily approved the assumption that the creation of the corporation was fraudulent. The panel therefore rejected Petitioner's claims that he had done nothing improper and that an attorney has an obligation to suggest means of achieving a lawful objective, holding that "an attorney's professional obligations [do not] require him to engage in crime with his client." A-10. This inaccurate

characterization of Petitioner's claims and this oversimplification of the problem has farreaching implications.

Assuming that Petitioner Haimowitz suspected, should have known, or actually knew of the questionable motives of his clients and advised the Abbotts to structure the business as they did, permitting the convictions to stand requires acceptance of three flawed premises. First, if an attorney advises a client to transfer assets to circumvent legal obligations which arise from ownership, that attorney is guilty of fraud and of conspiracy to defraud. Second, if an attorney documents a transfer of ownership from a husband to a wife but the husband and wife continue to believe that "ownership in fact" remained with the husband (and that the wife is the owner

"on paper only"), the attorney has committed fraud. Finally, if an attorney has reason to be suspicious of his client's motives, the attorney must not act on what his client has told him but must independently ascertain the true facts or continue his representation only at risk of criminal prosecution.

It is respectfully submitted that if these simplistic assumptions are correct, an extraordinary large percentage of the members of this nation's bar are at this moment subject to arrest, trial, conviction and incarceration for fraud. Virtually all attorneys who draft wills or trust agreements would be engaged in criminal activity if the first two assumptions were valid; indeed, numerous tax

attorneys and many corporate attorneys spend much of their time devising methods of effecting such transfers.

The third assumption, relating to a lawyer's obligation where he learns or suspects that his client may be involved in wrongdoing, purports to resolve -- by criminal prosecution -- some of the most complex and controversial issues of professional responsibility currently being debated by the American Bar Association and in law school classes around the country. Certainly, resolving these difficult ethical questions, as implicitly suggested by the Court of Appeals, by allowing for federal criminal prosecutions is not an acceptable solution. The problem is a serious one, and deserves this Court's careful attention.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court grant a writ of certiorari.

Respectfully submitted,

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June 1, 1984

APPENDIX

UNITED STATES of America,

Plaintiff-Appellee,

v.

Harold HAIMOWITZ, Dan Scarborough, George L. Onett,

Defendants-Appellants.

No. 82-3009

United States Court of Appeals, Eleventh Circuit.

March 5, 1984.

Appeals from the United States District Court for the Middle District of Florida.

Before FAY and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge.

Defendants Harold Haimowitz, Dan Scarborough, and George L. Onett were indicted on twenty counts. Count One charged that each of the defendants conspired to defraud by using and causing to be used the United States Postal Service in violation of 18 U.S.C. §§ 371 and 1341. Count Two charged that each of the defendants conspired to obstruct interstate commerce by extortion in violation of 18 U.S.C. § 1951. Count Three charged that defendant Haimowitz obstructed and attempted to obstruct interstate commerce by extortion in violation of 18 U.S.C. § 1951. Count Four charged each of the defendants with obstructing and attempting to obstruct interstate commerce by extortion in violation of 18 U.S.C. § 1951. Count Five charged

defendants Haimowitz and Scarborough with obstruction and attempted obstruction of interstate commerce by extortion in violation of 18 U.S.C. § 1951. Counts Six through Eight and Ten through Thirteen charged defendant Haimowitz with substantive mail fraud in violation of 18 U.S.C. § 1341. Counts Eighteen through Twenty charged defendant Onettt with perjury in violation of 18 U.S.C. § 1623.[1]

After a bench trial in the United States District Court of the Middle District of Florida, Haimowitz was found guilty on Counts One, Two, Four, Five, Six, Seven, Nine and Twelve, Scarborough was found guilty on Counts One, Two, Four, and Five, and Onett was

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[1] Counts Fourteen through Seventeen, which charged defendant Haimowitz with perjury, were severed.

found guilty on Counts One, Two, Four, Nine, Eighteen, and Nineteen.[2] We affirm the conviction of Haimowitz on Counts One, Two, Four, Six, Seven, Nine and Twelve, of Scarborough on Counts One, Two, and Four, and of Onett on Counts One, Two, Four, Nine, Eighteen and Nineteen. The convictions of Haimowitz and Scarborough on Count Five are reversed.

I. FACTS

This case involves a scheme by whch Haimowitz, Scarborough, and Onett sought to obtain a liquor license from

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[2] Haimowitz was sentenced in the aggregate to three years imprisonment, two years probation, and a $20,000 fine. Scarborough was sentenced to two years imprisonment, three years probation, and a $15,000 fine. Onett was sentenced to six months imprisonment followed by four and one-half years probation, and a $22,5000 fine.

the state of Florida for Peter Abbott,[3] whom they knew was not qualified to receive a license. To accomplish their scheme, defendants committed federal offenses of mail fraud and extortion.

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[3] Peter Abbott was the government's key witness. He first discussed the Jacksonville situation with the FBI in March 1980. In May 1980, the FBI began its undercover operation with audio and visual recordings. Abbott testified under a grant of immunity pursuant to a plea agreement, which provided that in exchange for his plea of guilty to wire fraud and his cooperation, he would receive a maximum sentence of three years in prison.

The district court prefaced its detailed findings of fact with a brief statement regarding the credibility of Abbott. The district court noted that Abbott admitted to having defrauded from six to twelve banking institutions of between $300,000 and $750,000, that he had six larceny convictions, that he participated in two previous Small Business Administration loan frauds, that he participated in two arsons, that he participated in narcotic sales, and that after his arrival in Jacksonville, he participated in a fraudulent Small Business

While the facts will be brought out in more detail throughout the opinion, we summarize the district court's findings of facts.

Peter Abbott first approached Haimowitz, a practicing lawyer in Jacksonville, Florida, in October or November of 1979. Haimowitz assisted Abbott in finding and purchasing a restaurant, which was to be operated as Abbott's Restaurant (the "restaurant"). In order to purchase the restaurant, Abbott needed a Small Business Administration ("SBA") loan. The loan

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Administration loan and numerous other bad acts, for all of which he was granted governmental immunity. Abbott pled guilty to interstate wire fraud in January 1981, for which he has not been sentenced. Abbott has also used different social security numbers illegally. The district court stated that it placed no stock in the truthfulness of his testimony except for when the truth was obvious.

application first reflected Haimowitz as a 10 percent owner but his interest was removed at the bank's insistence. The loan application then was approved reflecting a 50 per cent ownership interest in each of Peter Abbott and Jean Abbott, Peter's wife. The final loan application, which Haimowitz assisted Jean Abbott in executing, showed her as the 100 per cent owner.

The Articles of Incorporation for the restaurant reflect execution by Jean Abbott on December 10, 1979. The document was not actually signed, however, until January 3, 1980, at which time Jean Abbott's name was forged to the Articles by Peter Abbott in the presence of Haimowitz, and the signature was notarized by Haimowitz's secretary at Haimowitz's request.

Haimowitz also assisted the restaurant in obtaining a liquor license. On December 11, 1979, he accompanied Jean Abbott to the Jacksonville office of the Beverage Department of the State of Florida (the "Beverage Department"), where Jean Abbott executed a personal questionnaire and provided the Beverage Department with her fingerprints. In February, Haimowitz again accompanied Jean Abbott to the Beverage Department to file applications for a liquor license and permanent transfer of the liquor license. The officer in charge of the Beverage Department advised Haimowitz of the procedures for processing the applications, including the fact that all correspondence and applications were mailed from the

Jacksonville office of the Beverage Department to the Tallahassee office. An investigator from the Beverage Department made an on-site inspection of the restaurant, at which time Peter Abbott told the investigator that he and his wife, Jean, were divorced. Abbott reported this conversation to Haimowitz, and Haimowitz advised Abbott that he should not tell the beverage officials that he was divorced because they could determine the falsity of that allegation, but rather Abbott should tell them that he and his wife were separated and going to get divorced.

In March, the first temporary liquor license was issued to the restaurant and the restaurant opened for business. Peter Abbott provided Haimowitz with

the fee for the temporary license. In April, an investigator for the Beverage Department met with Haimowitz at the latter's office to examine the corporate books of the restaurant. Haimowitz denied that Peter Abbott had any interest, direct or indirect, in the restaurant and advised the investigator that the books were not ready but that they would be provided at a later date. Haimowitz bragged to the investigator about his association with the defendant Scarborough, whose photograph appeared in Haimowitz's office.

Subsequently, Haimowitz filed affidavits with the Beverage Department executed by Peter and Jean Abbott, which provided that Peter Abbott had no interest in the restaurant and would

not continue to sign checks on the restaurant account. Nevertheless, Abbott continued to sign many more checks, including some to Haimowitz. Abbott also signed the original check for a second temporary liquor license fee. Haimowitz met with the supervising officer of the Beverage Department and told the supervisor that Peter Abbott had no interest in the restaurant business. The supervisor informed Haimowitz of the statutory requirement of disclosure of all interested parties. Haimowitz told his secretary, upon her inquiry, that the reason for placing everything in Jean Abbott's name was that Peter Abbott was a convicted felon and that this information should remain secret.

Upon the insistence of the supervisor of the Beverage Department, Peter Abbott was taken by Haimowitz to the Jacksonville Beverage Department office to be fingerprinted. Haimowitz advised Abbott to keep quiet and follow his instructions. He also advised Abbott that even if the fingerprint investigation came back positive, they should not be concerned because all of the paperwork reflected that Peter Abbott had no interest in the restaurant.

On April 22, 1980, the Beverage Department disapproved the application for transfer of the liquor license. When Beverage Department officials attempted to pick up the temporary license from the restaurant, Abbott got in touch with Haimowitz, who obtained a

temporary injunction from a state court judge. Subsequently, Haimowitz and Louis H. Ritter, Sr.[4] met with Charles Nuzum, the director of the Beverage Department in Tallahassee. Nuzum advised Haimowitz and Ritter of the Beverage Department's concern regarding the liquor license application, and instructed them that the application must be amended to accurately reflect the true source of the funds used to acquire the restaurant, all parties directly or indirectly interested in the restaurant, and the correct marital status of Peter and Jean Abbott.

Thereafter, Haimowitz met with defendant Scarborough in the latter's legislative office. Scarborough at

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[4] Ritter was indicted on various counts with the other defendants but was acquitted on all charges.

that time was a state senator from the Jacksonville, Duval County, Florida area and was President Pro Tem of the Florida Senate. Scarborough suggested to Haimowitz that Haimowitz talk to defendant Onett, a lawyer engaged in lobbying activities in the state capital, for assistance in obtaining the transfer of the permanent liquor license. Subsequently, Haimowitz advised Abbott that Scarborough would obtain the services of Onett and that Onett had wanted $25,000, but Haimowitz had talked Onett down to $20,000, and Scarborough had further "muscled" Onett down to $15,000.

In May, Onett told Nuzum that he was working with Haimowitz on the Abbott's Restaurant liquor license application. Nuzum advised Onett of the same matters

which he had reported to Haimowitz, including the requirements to obtain approval of the license transfer application. Onett advised Nuzum that Peter Abbott had no ownership interest, direct or indirect, in the restaurant operation.

In the meantime, Haimowitz filed an amended application in the Jacksonville office of the Beverage Department for the transfer of the permanent liquor license. Haimowitz accompanied Jean Abbott to the office and instructed her to let him do the talking. Later, Haimowitz met with Peter Abbott and advised him not to tell his wife that he was "paying off" for the liquor license. Haimowitz also advised Abbott how to phrase his conversation with Scarborough when they were to meet with

Scarborough later that week. In addition, Haimowitz told Abbott that Scarborough was upset because Abbott had not yet paid the $15,000.

On May 24, 1980, Peter Abbot was videotaped counting $7,500 in denominations of $10 and $20 bills. Abbott placed the money in a manila envelope and handed it to Haimowitz, who ultimately left the restaurant carrying the manila envelope. Nearly six weeks later, in July, 1980, Onett instructed his secretary to type a letter receipt to Jean Abbott for the $7,500 cash paid by Peter Abbott. The letter was not delivered until July 17, 1980. Haimowitz told Peter Abbott that his money would be returned if Onett was not able to obtain the permanent liquor license.

In June, Ritter obtained copies of newspaper clippings regarding Peter Abbott, which he discussed with Haimowitz and Scarborough. In July, Onett, Scarborough and his wife, and others had dinner at the restaurant, at which time Onett and Scarborough discussed that Peter Abbott was a "bad guy" and in the "Mafia." They also stated that they were attempting to place all of Peter Abbott's assets in his wife's name. Upon departing the restaurant, Scarborough introduced Abbott as the owner of the restaurant.

Some time in August, the restaurant closed. On August 21, 1980, the Beverage Department finall disapproved the liquor license transfer application.

II. HAIMOWITZ

We will examine the claims of each defendant individually. Haimowitz makes the following claims on appeal: 1) his convictions for conspiracy to commit mail fraud and for mail fraud cannot stand; 2) his guilt on the counts of conspiracy, extortion, and attempted extortion was not established beyond a reasonable doubt; 3) he was prejudiced by being required to elect entrapment before the government completed its case; 4) his motion for a new trial based upon newly discovered evidence amounting to "governmental misconduct" should have been granted; and 5) the convictions rest on inadmissible hearsay.[5]

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[5] Haimowitz also contends that the search warrant used to search his office was improper. He incorporates

The first issue is whether Haimowitz's convictions for conspiracy to commit mail fraud and for mail fraud can stand. Haimowitz was convicted of using the Postal Service to execute a scheme to defraud and to obtain property by means of false and fraudulent representations in violation of 18 U.S.C.A. § 1341[6] (Counts Six,

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the legal arguments made in an appeal to this Court in United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983), where he challenged the seizure of evidence based upon the same warrant. We adopt the reasoning of that opinion and hold that the warrant was valid.

In addition, Haimowitz incorporates arguments raised by his co-defendants. Because we affirm the convictions of his co-defendants, we need not reach the question of Haimowitz's standing to raise these arguments.

[6] 18 U.S.C.A. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by

Seven, Nine, and Twelve) and of conspiring to commit mail fraud in violation of 18 U.S.C.A. § 371 (Count One).[7] The district court found that the nature of the scheme was to defraud

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means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or received therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

the citizens of Florida and the Beverage Department of the right to the honest and faithful performance of defendant Scarborough in his official capacity as a state senator, and of the right to pertinent and true information in the administration of Florida's laws. The district court also found that the scheme was executed to obtain

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7 18 U.S.C.A. § 371 proivides:

> If two or more persons conspire, either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

a temporary and permanent alcoholic beverage license for the restaurant by false and fraudulent pretenses, representations, and promises, and by the intentional and knowing concealment of material facts.[8]

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[8] The Florida statutes regulating alcoholic beverage license applications provide in pertinent part:

> 561.15 Licenses: qualifications required
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> (1) Licenses shall be issued to persons of good moral character who are not less than 19 years of age. Licenses to corporations shall be issued only to corporations whose officers are of good moral character and not less than 19 years of age. There shall be no exemptions from the license taxes herein provided to any person, association of persons, or corporation, any law to the contrary notwithstanding.
>
> (2) No license under the Beverage Law shall be issued to any person who has been convicted within the last past 5 years of any offense against the beverage

A conviction for mail fraud under 18 U.S.C.A. § 1341 requires proof: 1) of the participation by the defendant in a scheme to defraud; 2) of the use of the mails in furtherance of the scheme; and

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laws of this state, the United States, or any other state; who has been convicted within the last past 5 years in this state or any other state or the United States of soliciting for prostitution, pandering, letting premises for prostitution, keeping a disorderly place, or legally dealing in narcotics; or who has been convicted in the last past 15 years of any felony in this state or any other state or the United States; or to a corporation, any of the officers of which shall have been so convicted.

561.17 License applications; approved person

(1) Any person, before engaging in the business of manufacturing, bottling, distributing, selling, or in any way dealing in alcoholic beverages, shall file, with the district supervisor of the district of the division in which

3) that the defendant connected with the scheme used or caused the use of the mails. United States v. Hartley, 678 F.2d 961, 985 (11th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct.

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the place of business for which a license is sought is located, a sworn application in duplicate on forms provided to the district supervisor by the division. Prior to any application being approved, the division may require the applicant to file a set of fingerprints on regular United States Department of Justice forms for himself and for any person or persons interested directly or indirectly with the applicant in the business for which the license is being sought, when so required by the division. If the applicant or any person who is interested in the business or who has a security interest percentage payment from the proceeds of the business, either by lease or otherwise, is not qualified, the application shall be denied by the division....

561.18 License Investigation

After the application has been

815, 74 L.Ed.2d 1014 (1983). See also Pereira v. United States, 347 U.S. 1, 8, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954); United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981); United States v. Green, 494 F.2d 820, 823 (5th Cir.), cert. denied, 419 U.S. 1004, 95 S.Ct. 325, 42 L.Ed.2d 280 (1974).

The district court found that the government proved the three requirements. In examining the sufficiency of the evidence, the court of appeals must review the evidence in the light most favorable to the

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filed with the local district office supervisor, the district supervisor shall cause the application to be fully investigated, both as to qualifications of the applicants and a manager or person to be in charge and the premises and location sought to be licensed....

government. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); United States v. Pullen, 721 F.2d 788, at 790-791 (11th Cir. 1983). This Court must make all reasonable inferences and credibility choices in favor of the factfinder's verdict. United States v. Pullen, at 790-791; United States v. Morano, 697 F.2d 923, 927 (11th Cir. 1983). We hold that the record supports the finding by the district court that Haimowitz conspired to and participated in a scheme to defraud, that the mails were used in furtherance of the scheme, and that Haimowitz caused the use of the mails.

Under the first element, the government was required to show that the defendant participated in a scheme

to defraud. First, the record shows that Haimowitz misrepresented to the Beverage Department that Peter Abbott had no interest, direct or indirect, in the ownership of the restaurant and that he would not acquire any in the future. Haimowitz looked for potential restaurants with Peter Abbott alone, not with Jean Abbott. Haimowitz drafted a contract for Peter Abbott, as purchaser, to purchase the restaurant and Peter Abbott, not Jean, provided Haimowitz with the $3,000 for the seller. Peter Abbott and Haimowitz decided that Haimowitz was to have an ownership interest. The loan approved on December 17, 1979 by the American National Bank reflected a 50 per cent ownership interest in each of Peter and Jean Abbott. It was not until the SBA

loan for the purchase of the restaurant was closed on January 4, 1980 that the document showed that Jean Abbott owned 100 per cent of the restaurant. Haimowitz was aware the Abbott signed checks for the restaurant even though Abbott supposedly had no interest. When Haimowitz needed authorization for expenditures of $15,000 to obtain the assistance of defendant Onett, he looked to Peter Abbott, not Jean. A personal financial statement of Abbott that was seized from Haimowitz's office reflected that Peter Abbott was the president and general manager of the restaurant.

Jean Abbott testified that she was the owner "on paper only." On paper, she owned all of the outstanding shares of the restaurant and was the

president, vice-president, secretary, treasurer, and sole director of the corporation. She had not even signed the Articles of Incorporation for Abbott's Restaurant, Inc. -- Peter Abbott forged his wife's name in Haimowitz's presence.

Haimowitz knew that Peter Abbott and not Jean Abbott was the owner, yet he misrepresented Peter Abbott's ownership interest to the Beverage Department. Haimowitz accompanied Jean Abbott when she alone went to the Beverage Department to execute a personal questionnaire and provide the Department with her fingerprints. Haimowitz denied to an investigator for the Beverage Department that Peter Abbott had any direct or indirect interest in the restauranmt. Haimowitz

prepared affidavits for execution by Peter and Jean Abbott, which provided that Peter Abbott had no interest in the restaurant.

Haimowitz not only misrepresented Peter Abbott's ownership, he also tried to conceal it. He rejected the suggestion of an advertising agent that Peter Abbott's alleged impressive background in restaurant management be included on the menu for the restaurant. Haimowitz continually instructed Peter Abbott to create an appearance to his employees and others that he was simply a manager-employee. Haimowitz and defendant Scarborough discussed with Abbott the hiding of his business cards, and both instruct Abbott to maintain a "low profile."

Second, the record shows that Haimowitz, during the pendency of the liquor license application, believed that Peter Abbott had a felony conviction and yet concealed this from the Beverage Department. Haimowitz had conversations with Onett and others in which they discussed that Abbott's vehicular homicide conviction would be "taken" by the state beverage officials as a misdemeanor, thereby indicating knowledge of the fact that it was a felony but would merely be "taken" in the lesser category of a misdemeanor. The district court found it inconceivable that a practicing attorney would consider a vehicular homicide a misdemeanor. Haimowitz became upset when the staff attorney for the Department of Business

Regulations stated that it was not his understanding that Peter Abbott's vehicular homicide would be considered as a misdemeanor. The district court found it reasonable to infer that Haimowitz would not have become upset but for the fact that Haimowitz believed the true status of the vehicular homicide to be that of a felony. Finally, in April 1980, Haimowitz told his secretary that the reason for placing all of the paperwork and ownership in Jean Abbott's name was that Peter Abbott was a convicted felon.

Third the record shows that Haimowitz misrepresented and concealed the amounts and sources of monies invested in the restaurant. Haimowitz assisted Peter Abbott in securing

almost 100 percent financing for the restaurant and was aware that Peter Abbott had invested only between $10,000 and $12,000 in the venture. Haimowitz assisted Jean Abbott in completing the personal questionnaire for the Beverage Department, which suggested that approximately $200,000 was to be invested. In connection with an amendment to the liquor license application, Haimowitz submitted a schedule of secure funds to the Beverage Department which reported a personal investment of approximately $66,000. Both of these figures were false and known by Haimowitz to be false by virtue of his own testimony that he knew Peter Abbott had actually invested only between $10,000 and $12,000. Peter Abbott advised

Haimowitz that the Charter Company stock listed the personal questionnaire executed by Jean Abbott was not in fact owned by either of the Abbotts. Peter Abbott told Haimowitz that the money invested in the restaurant was "washed money." Haimowitz stated in reply, "Now I got to cover that up." Haimowitz did, in fact, cover that up when he filed the schedule of secured funds on May 8, 1980.

Fourth, the record shows that Haimowitz misrepresented to the Beverage Department that Peter and Jean Abbott were experiencing domestic difficulties and were contemplating a divorce. Jean Abbott testified that she did not tell Haimowitz of any marital difficulties and that none existed. Haimowitz had a social

relationship with the Abbott family and never discussed with them filing divorce or separation papers. Haimowitz attended the closing on a home purchased jointly by Peter and Jean Abbott. Having learned that Peter Abbott had told the Beverage Department investigator that he and Jean were divorced, Haimowitz advised Peter Abbott to merely suggest that the Abbotts were going to get a divorce because Haimowitz could not substantiate that the Abbotts were divorced.

Having established that Haimowitz participated in a scheme to defraud, under the second and third elements of mail fraud, the government must then show that the mails were used in furtherance of the scheme and that

Haimowitz used for or caused the use of the mails. Under 18 U.S.C.A. § 1341, the mailing does not have to be an essential element of the scheme; it is sufficient if the mailing is incidental to an essential part of the scheme. Pereira v. United States, 347 U.S. at 8, 74 S.Ct. at 363, 98 L.Ed. 435; United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2020, 72 L.Ed.2d 474 (1982); United States v. Green, 494 F.2d 820, 823-24 (5th Cir.) cert. denied , 419 U.S. 1004, 95 S.Ct. 325, 42 L.Ed.2d 280 (1974). In this case, the liquor license applications, upon which the scheme was based, were mailed from the Jacksonville office of the

Beverage Department to its office in Tallahassee on March 14, 1980, April 8, 1980, May 12, 1980, and June 18, 1980.[9]

A defendant "causes" the mails to be used when he or she acts with the knowledge that the use of the mails will follow in the ordinary course of business, or when such use can reasonably be foreseen, even though not actually intended. Pereira v. United

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[9] Haimowitz argues that the expansion of the reach of federal authority and jurisdiction to state liquor transactions solely on the basis of intra-departamental mailings is an overly-broad interpretation of 18 U.S.C.A. § 1341. This Court finds that the requirements of § 1341 have been met. See Bannister v. United States, 379 F.2d 750 (5th Cir. 1967), cert. denied, 390 U.S. 927, 88 S.Ct. 861, 19 L.Ed.2d 988 (1968) (§ 1341 violation when office communications were mailed between a Jacksonville insurance agency and the home office in New York); Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) ("The crime of mail fraud is broad in scope.")

States, 347 U.S. at 8-9, 74 S.Ct. at 363, 98 L.Ed. 435; United States v. Green, 494 F.2d at 824. It is not necessary that the defendant do any of the mailing. Pereira v. United States, 347 U.S. at 8, 74 S.Ct. at 363, 98 L.Ed. 435; United States v. Martino, 648 F.2d at 394. Haimowitz did not actually do any of the mailing. Nevertheless, he had been advised that all liquor license correspondence and applications must be mailed from the Jacksonville office to the Tallahassee office.

Thus, Haimowitz conspired with Scarborough and Onett to defraud and to unlawfully obtain property in violation of 18 U.S.C.A. § 371. Having devised the scheme, he unlawfully and willfully caused liquor license correspondence

and applications to be sent and delivered by the United States Postal Service in violation of 18 U.S.C.A. § 1341. Therefore, we affirm Haimowitz's conspiracy and substantive mail fraud convictions.[10]

Haimowitz's second claim is that his guilt for conspiracy to extort, extortion, and attempted extortion was not established beyond a reasonable doubt (Counts Two, Four and Five). Under the Hobbs Act, it is a crime to obstruct or affect interstate commerce

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[10] Haimowitz also contends that his professional obligations as an attorney compelled him to act as he did. This Court disagrees that an attorney's professional obligations require him to engage in crime with his client. Cf. United States v. Kelly, 569 F.2d 928, 938 (5th Cir.); cert. denied, 439 U.S. 829, 99 S.Ct. 105, 58 L.Ed.2d 123 (1978); United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975).

by obtaining the property of another through extortionate means. 18 U.S.C.A. § 1951.[11] "Extortion" is defined as "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C.A. § 1951(b)(2). The district court found that extortion was accomplished by both statutory means -- under color of

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[11] 18 U.S.C.A. § 1951(a) provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attemps or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

official right and by fear of financial and economic loss and injury of the business of the restaurant.

Haimowitz contends that any extortion conviction resting on fear of economic loss must fail, because Haimowitz did not instill fear and because Abbott was cooperating with the federal authorities, and therefore had no expectation of receiving a liquor license. The fear experienced by the victim does not have to be the consequence of a direct threat. Rather, extortion is found if the circumstances render the victim's fear reasonable. United States v. Kopituk, 690 F.2d 1289, 1328 (11th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983); United States v. Sander, 615 F.2d 215, 218

(5th Cir. 1980); United States v. Quinn, 514 F.2d 1250, 1266-67 (5th Cir. 1975), cert. denied, 424 U.S. 955, 96 S.Ct. 1430, 47 L.Ed.2d 361 (1976). Fear of economic loss is a type of fear within the purview of § 1951. United States v. Kopituk, 690 F.2d at 1328; United States v. Sander, 615 F.2d at 218; United States v. Quinn, 514 F.2d at 1267. The defendant does not need to have caused the fear; the statute is satisfied if he or she intended to exploit the fear. United States v. Gerald, 624 F.2d 1291, 1299 (5th Cir. 1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981).

In this case, the restaurant needed a state liquor license to operate as a supper club. The license was vital to the economic well-being of the

establishment. Haimowitz pressured Peter Abbott to pay defendant Onett $15,000 to obtain the liquor license. In particular, the record shows that Haimowitz reported to Abbott that Senator Scarborough was so upset that Abbott had not yet paid that he was going to quit helping and that Haimowitz did not know what that would mean.

Thus, we accept the district court's finding that Peter Abbott had a reasonable fear of economic loss, which Haimowitz exploited. The fact that Abbott had begun cooperating with federal authorities when he paid the $7,500 does not support defendant's position that Abbott could not be the victim of extortion. In United States v. Quinn, 514 F.2d at 1267, the court

stated tht "[t]he Hobbs Act forbids attempted extortion as well as actual extortion. Therefore, in a case where the F.B.I. foils the actual offense, it is possible for one to commit attempted extortion." See also Blachly v. United States, 380 F.2d 665, 673 (5th Cir. 1967) (success of the scheme to defraud is not essential to completion of the offense).

The government also based its case against Haimowitz on his involvement in a conspiracy to extort money from Abbott "under color of official right." We hold that there is sufficient evidence in the record to support the district court's finding that Haimowitz was part of a scheme by which Scarborough used his official office to extort money from Peter Abbott. The

Fifth Circuit has stated that "[i]n proving the crime of extortion, where intent often must be inferred from ambiguous statements and situations, the jury's verdict must be accorded substantial weight." United States v. Duhon, 565 F.2d 345, 352 (5th Cir.), cert. denied, 435 U.S. 952, 92 S.Ct. 1580, 55 L.Ed.2d 802 (1978). Here, the district court judge acted as jury and thus his verdict must be accorded substantial weight.

The record shows that Haimowitz advised Peter Abbott that they should secure the services of defendant Scarborough, who was then a state senator, because he had a great deal of clout. Haimowitz also advised Peter Abbott that Scarborough was so powerful that he had gotten the governor to

appoint Haimowitz to the Construction Licensing Board of the State. Haimowitz suggested that Scarborough would be able to place pressure on the Director of the Division of Alcoholic Beverages, and Scarborough advised that he had "made a believer" out of the Director on a prior occasion. From conversations among Scarborough, Haimowitz, and Peter Abbott, the finder of fact could infer that defendants were willing to corrupt Scarborough's office and participate in influence peddling.

Haimowitz's instruction to Peter Abbott to refer to the payment as a "fee" when discussing the payment with Scarborough is indicative of the extortionate nature of the payment. The evidence also shows that the

payment was made in cash, that it was paid one day after Onett commenced work on the application, that transfers of such licenses are frequently accomplished without attorney assistance, that Onett neglected to make a notation of the receipt in his law account, and that Onett did not draw up a receipt until almost six weeks after the $7,500 cash was paid.

Haimowitz also contends that the government has not established the effect on interstate commerce required under 18 U.S.C.A. § 1951. The statute defines commerce in broad terms, 18 U.S.C.A. § 1951(b)(3), and the Fifth Circuit has indicated that a showing of a minimal effect on interstate commerce will sustain jurisdiction under the statute. See United States v. Gerald,

624 F.2d at 1299 (jurisdictional interstate commerce element generally does not place a large burden on the government because even a minimal effect on interstate commerce will sustain jurisdiction under the statute); United States v. Sander, 615 F.2d 215, 218 (5th Cir. 1980). The district court found that the minimal effect on interstate commerce was shown since the restaurant regularly utilized and sought to utilize professional entertainers from other states who were transported in interstate commerce, and liquor, foodstuffs, and other materials that were produced in other states and transported in interstate commerce. We will not disturb its finding.

Haimowitz was also convicted for extortion under Count Five, which alleges that he attempted to extort $1,000 from Abbott as a campaign contribution for Scarborough. We agree with Haimowitz that the evidence in support of Count Five was deficient.[12] First, there was no showing that Haimowitz participated in the solicitiation and secondly, there was no proof that this demand was coupled with a promise by Scarborough to perform some act of official grace.

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[12] The evidence consists of the following taped conversation:

> Scarborough: I'm running for re-election by the way.
> Haimowitz: Wait a minute, we'll get into that later.
> Scarborough: No, no, no, I'll get into this now. I need a thousand dollars from you when I run, in the form of a company check.
> Abbott: No problem. I, you got it....

See United States v. Dozier, 672 F.2d 531, 537 (5th Cir.), cert. denied. ___ U.S. ___, 103 S.Ct. 256, 74 L.Ed.2d 200 (1982).

Haimowitz's third basis for appeal is that the district court erroneously required him to elect whether he would rely on the defense of entrapment. Before the government rested its case, it moved the district court to compel defendants to declare whether they were relying on the entrapment defense based on the evidence in the government's case-in-chief. Defendants objected on the theory that the absence of any local rule indicated that the court was without authority to require such an election. The district court granted

the government's motion and defendants announced that they would not rely on the entrapment defense.

Haimowitz contends that the district court erred because, procedurally, the issue of entrapment first is injected by the defendant into the case and then the government may offer evidence to rebut the defense. According to Haimowitz, the district court's order compelled defendants to either waive the defense of entrapment or admit culpability and face predisposition evidence as part of the government's case-in-chief.

We disagree with Haimowitz's analysis. Although the general rule is that entrapment may not be raised as a defense unless the defendant admits the acts upon which the prosecution is

based, United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir.), cert. denied, 457 U.S. 118, 102 S.Ct. 2929, 73 L.Ed.2d 1330 (1982), an exception to the rule arises if the government's own case-in-chief injects substantial evidence of entrapment into the case. Then the defendant may raise the defense of entrapment even though he denies the acts upon which the prosecution is predicated. United States v. Greenfield, 554 F.2d 179, 182 (5th Cir. 1977), cert. denied, 439 U.S. 860, 99 S.Ct. 178, 58 L.Ed.2d 168 (1978); Sears v. United States, 343 F.2d 139, 143-44 (5th Cir. 1965). Thus, defendants were not required to admit wrongdoing. Nor were defendants precluded from presenting an entrapment defense in their own case-in-chief.

The government stated that it only sought an announcement by defendants of their intention to rely on entrapment based on the government's case-in-chief, and that it was not preventing the defendants from later raising the entrapment defense. The government asked if defendants were ready to elect the entrapment defense so it would know whether to proceed with predisposition evidence in its case-in-chief. The district court did not require a waiver of the entrapment defense, but merely employed a procedural vehicle to ensure the orderly presentation of evidence. Cf. United States v. Ramirez, 533 F.2d 138 (5th Cir.), cert. denied, 429 U.S. 884, 97 S.Ct. 235, 50 L.Ed.2d 165 (1976) (the trial court's limitation of cross-examination was clearly within

its discretion); Rule 611(a) of the Federal Rules of Evidence. Thus, there was no prejudicial error.

Haimowitz's fourth contention on appeal is that his motion for a new trial based upon newly discovered evidence amounting to governmental misconduct should have been granted. Peter Abbott was arrested on June 4, 1982, almost two months after the trial ended, on charges of federal tax fraud. Haimowitz asserts that the government knew of this fraud during his trial and that disclosures of the criminal investigation would have been significant as to Peter and Jean Abbott's credibility and as to the possible existence of vital documents and records.

The denial of such a motion will be reversed only when it is shown that the ruling is so clearly erroneous as to amount to an abuse of the district court's sound discretion. United States v. Mesa, 660 F.2d 1070, 1077 (5th Cir. 1981). Five elements must be present to justify a new trial: 1) the evidence must be discovered following trial; 2) the movant must show due diligence to discover the evidence; 3) the evidence must not be merely cumulative or impeaching; 4) the evidence must be material to issues before the court; and 5) the evidence must be of such a nature that a new trial would probably produce a new result. United States v. Mesa, 660 F.2d at 1077. The fact-finder in this case, the judge, was already aware of

numerous past offenses committed by Peter Abbott.[13] Defendant has not demonstrated in what way Peter Abbott's conviction affected Jean Abbott's credibility or in what way the "possible" documents were material to this case. The United States stated that it first learned of the IRS investigation on April 29, 1982, five days after the trial ended. Thus, Haimowitz failed to show that he was entitled to a new trial based on newly discovered evidence.

Haimowitz's final contention is that his convictions rest on inadmissible hearsay. Under Rule 801(d)(2)(E) of

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[13] In his findings of fact, the district court judge listed Peter Abbott's past "bad acts" and stated that he placed no stock in the truthfulness of Abbott's testimony except when the truth was obvious. See supra footnote 3.

the Federal Rules of Evidence, a statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Although such statement is not hearsay, it is admissible only if there is proof that a conspiracy exists, that the statement was made during the course of and in furtherance of the conspiracy, and that the declarant and the defendant were members of the conspiracy. United States v. James, 590 F.2d 575, 578 (5th Cir.) (en banc), cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979).

During the government's case, each defendant objected, on hearsay grounds, to the admission of testimony regarding

out-of-court statements by Peter Abbott, Jean Abbott, and codefendants. The district court admitted the statements subject to being connected up. Immediately prior to closing arguments, the district court ruled that it had found substantial evidence of a conspiracy and it overruled all continuing objections to the allegedly inadmissible hearsay. Haimowitz contends that the trial court's duty was not satisfied by its conclusory ruling. We hold that there was sufficient independent evidence of a conspiracy to warrant admissions of the statements and that the district court was not required to hold a hearing on this issue before admitting the statements but rather, was allowed to admit the statements "subject to being

connected up." United States v. James, 590 F.2d at 582. Accord, United States v. Hawkins, 661 F.2d 436, 449 (5th Cir. 1981), cert. denied, 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982). Furthermore, James does not require the district court to articulate the facts and reasons in support of its ruling.

III. SCARBOROUGH

Defendant Scarborough makes the following claims on appeal: 1) the district court erred in refusing to order the production of an FBI agent's notes of statements given by Scarborough; 2) the district court erred in denying his motion for directed verdict of acquittal at the close of all of the evidence; and 3)

the district court erred in denying his motion for judgment of acquittal for "outrageous governmental conduct."

The first issue raised by Scarborough is whether the district court erred in refusing to order the production of an FBI agent's notes of statements given by Scarborough. On August 28, 1980, FBI Agent Gerald Collins met and interviewed Scarborough in the Jacksonville FBI office for approximately one hour. Agent Collins took notes during the interview, and he later dictated a statement to his secretary based on his notes. He acknowledged that the typed statement was not "a word for word verbatim statement of everything that Dan Scarborough said." After the statement of August 28 was typed up, it was

delivered to Scarborough and he was told to check it to make sure it was correct, and that he could add or change anything. On September 2, 1980, Scarborough returned the statement to the FBI with corrections. At trial, the government used the differences between the original and corrected statements to impugn Scarborough's credibility. The district court denied Scarborough's motion to order the FBI agent to produce his notes from which he dictated the initial statement. In its findings, the district court included the evidence of discrepancies between the August 28 and September 2 statements as one of seven factors indicating that Scarborough was not credible.

In this appeal, Scarborough implies that he is relying on Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1957), for the proposition that the government was required to produce the notes. At trial, however, the district court asked defendant's counsel for his authority for the production of the notes. Counsel stated that he was not suggesting the presence of a Jencks Act violation nor did he mention Brady. Rather, counsel based his request for production of the notes, as near as we can tell from the record, on the best evidence rule.[14] Because "a party

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[14] The trial record reveals that Scarborough's counsel's objections were limited to the following:

cannot object on one ground in the trial court and then urge on appeal that the objection should [be] sustained on another ground", United States v. Haynes, 573 F.2d 236, 241 n.8 (5th Cir.), cert. denied, 439 U.S. 850, 99 S.Ct. 154, 58 L.Ed.2d 153 (1978), we

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The Court: What authority is there for those notes?
Mr. Dean: The notes, Your Honor, would be the best evidence as to what appeared in the statement that was eventually typed up on August 28....
The Court: You are not suggesting that it is Jenk's [sic] Act or anything like that?
Mr. Dean: No. I am suggesting the notes would be the best evidence as to what was actually said on the 28th rather that what some secretary supposedly typed up and presented to, at that time, Senator Scarborough, in which changes were made.
The Court: Well, I am not going to order them to produce.

hold that Scarborough failed to preserve his claim for proper appellate review.

Scarborough's second issue is whether the district court erred in denying his motion for directed verdict of acquittal at the close of all the evidence. As stated earlier, when a criminal defendant challenges the sufficiency of the evidence to support his conviction, an appellate court must view the evidence and inferences in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942).

Like Haimowitz, Scarborough was found guilty of conspiring to commit mail fraud, 18 U.S.C.A. § 1341,[15] in

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[15] See supra footnote 6 for text of §

violation of 18 U.S.C.A. § 371 (Count One).[16] The record shows that Scarborough was willing to permit, encourage, and assist the concealment of Abbott's ownership interest and background in obtaining the license. Scarborough knew of the contents of the liquor license, which did not show that Peter Abbott had an ownership interest in the restaurant. Yet Scarborough testified that he believed Peter Abbott had an ownership interest in the restaurant. On one occasion, Scarborough introduced Peter Abbott as the "owner" of the restaurant. Scarborough also knew of Peter Abbott's criminal and improper background.

1341.

16 See supra footnote 7 for text of § 371.

Peter Abbott told Scarborough that the source of the money used in making the $1,000 payment to Ritter was "washed" money that Peter Abbott, not Jean, possessed. In the presence of Onett, Scarborough mentioned that Peter Abbott was in the "Mafia" and was a convicted felon. Scarborough reported to Peter Abbott that both he and Onett were aware that Abbott was involved with the license and that Abbott had something improper in his background or otherwise that would normally prevent him from obtaining a liquor license. Although Scarborough knew of the difficulties in obtaining the license, Scarborough advised Peter Abbott to try to keep a "low profile." He discussed placing the restaurant's assets in Jean Abbott's name so that the restaurant

could obtain a liquor license. Scarborough was aware that one of the principal reasons that the Beverage Department scrutinized applicants was to keep criminal figures out of the liquor business. Thus, we cannot accept Scarborough's characterization of his involvement as simply that of a senator advising a constituent.

Viewing the evidence in the light most favorable to the government, we hold that there was sufficient evidence in the record to support the district court's finding that Scarborough participated with Onett and Haimowitz in the conspiracy to commit mail fraud. Scarborough knew of Abbott's misrepresentations to the Beverage Department, yet he helped conceal them.

The district court also found that Scarborough, with Haimowitz and Onett, conspired to induce and did induce Peter Abbott and Abbott's Restaurants, Inc. to part with property by extortion (Counts Two, Four and Five). Scarborough and Haimowitz discussed with Peter Abbott their willingness to corrupt Scarborough's office and participate in influence peddling. Scarborough assured Peter Abbott that if the application was not approved, Scarborough would see that Peter Abbott's money was returned. Although Scarborough first denied to a local television station that he delivered any cash to Onett, he subsequently testified as to how he meticulously hid the money in the trunk of his automobile. Yet, he could not recall

how he delivered the money to Onett. Based on inconsistencies in his testimony, the district court concluded that Scarborough received a portion of the $7,500. Even if Scarborough did not receive a portion of the money, a Hobbs Act prosecution is not defeated simply because the extorter transmitted the extorted monies to a third party. Scarborough nevertheless participated in the scheme to induce Peter Abbott to part with his property. See United States v. Hyde, 448 F.2d 815, 843 (5th Cir.), cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972) (one need receive no personal benefit to be guilty of extortion).

With regard to Scarborough's conviction for soliciting a $1,000 campaign contribution in exchange for

his services (Count Five), the conviction is reversed for insufficiency of evidence, as discussed above with respect to the same claim raised by Haimowitz.

Scarborough's third claim is that the trial court erred when it denied a motion for judgment of acquittal for a due process violation caused by what he called "outrageous governmental conduct." According to Scarborough, the Abbott investigation was an undercover operation created entirely by the government, and as such, violated due process guarantees of fundamental fairness. Scarborough contends that the court should consider the special status of a legislator when applying the due process standard.

In United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), the Supreme Court recognized outrageous governmental conduct as a legal defense. To succeed under this defense, the defendant must show that the challenged governmental conduct violated "'that fundamental fairness, shocking to the universal sense of justice,' mandated by the due process clause of the fifth amendment." 411 U.S. at 432, 93 S.Ct. at 1643 (quoting Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246, 80 S.Ct. 297, 303, 4 L.Ed.2d 268 (1960)). See also Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), cert. denied, 457 U.S. 1108, 102 S.Ct. 2908, 73

L.Ed.2d 1317 (1982). Whether outrageous governmental conduct exists "turns upon the totality of the circumstances with no single factor controlling" and the defense "can only be invoked in the rarest and most outrageous circumstances." United States v. Tobias, 662 F.2d at 387. Neither the Supreme Court nor the Fifth nor Eleventh Circuits has ever reversed a case on this ground. United States v. Sayers, 698 F.2d 1128, 1130 (11th Cir. 1983); United States v. Gianni, 678 F.2d 956, 959-60 (11th Cir.), cert. denied, --- U.S. ---, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982).

We hold that Scarborough has not shown the presence of outrageous governmental conduct. A state senator enjoys no special consideration from

the court when it views the totality of the circumstances involving a due process claim. See United States v. Dean, 666 F.2d 174 (5th Cir.) cert. denied, 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982). In this case, Scarborough was brought into the scheme by codefendant Haimowitz, not by the government or its agent, Peter Abbott. Nor is this Court persuaded by Scarborough's argument that undercover operations will have a chilling effect on the willingness of public officials to meet with a constituent for fear of being "set up." Any public official approached by a constituent to participate in an illegal scheme can simply say "No."

IV. ONETT

Defendant Onett makes the following claims on appeal: 1) the trial court erred in denying his motions for a judgment of acquittal for insufficiency of the evidence; 2) the trial court erred in failing to suppress the results of illegal electronic surveillance; and 3) the trial court erred to the substantial prejudice of Onett when it admitted various statements of alleged coconspirators.[17]

The first issue is whether the trial court erred in denying Onett's motions for a judgment of acquittal. As stated earlier, this Court must examine the

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[17] Onett also incorporates arguments of his codenfendants. Since their convictions were affirmed, we need not reach the issue or whether he has standing to incorporate their argument.

evidence in the light most favorable to the government. First, Onett asks that we examine the conspiracy and substantive mail fraud convictions under 18 U.S.C.A. § 1341[18] and 18 U.S.C.A. § 371[19] (Counts One and Nine).

The government was required to prove that Onett participated in the scheme to defraud. United States v. Hartley, 678 F.2d 961, 985 (11th Cir. 1982), cert. denied, --- U.S. ---, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983). On May 1, 1980, Haimowitz first contacted Onett for assistance in obtaining the liquor license. On May 7, 1980, Haimowitz and Onett discussed preparing an amendment

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[18] See supra footnote 6 for text of § 1341.

[19] See supra footnote 7 for text of § 371.

to the original license application and Onett advised Haimowitz to complete the amendment to show that Peter Abbott had an "outside interest" by listing Peter Abbott as simply an "accomodation endorser and guarantor," and by indicating that the Small Business Administration note executed by Abbott was to be "with no recourse against the establishment." The amended application containing Onett's suggestions was filed by Haimowitz on May 8, 1980 and was mailed from Jacksonville to Tallahassee on May 12, 1980). In addition, a "save harmless agreement" was filed with the amended application at Onett's suggestion. Onett maintained a personal copy of the amended application in his file. In late April or early May, Onett told the

Beverage Department that he represented Peter Abbott, not Jean Abbott. Notwithstanding the fact that Onett's copy of the license application did not list Peter Abbott as being an officer, director, or shareholder of the corporation, on May 7, 1980 Haimowitz told Onett that he would have to get approval of Onett's fee from Peter Abbott, not Jean Abbott. Onett never had any conversations, in person or by telephone, with Jean Abbott regarding the beverage license application.

Based on those facts, we believe that there was sufficient evidence to support the district court's finding that Onett knew of the contents of the beverage license applications and knew that Abbott's ownership interest was misrepresented. The district court

could easily infer that Onett knew that Abbott was more than simply an "accommodation endorser and guarantor."

Events subsequent to the May 12, 1980 mailing also evidence Onett's role in the scheme. A conversation between Abbott and Scarborough on May 24, 1980 indicates that Scarborough and Onett both were knowledgeable of and had discussed the fact that the true applicant for the liquor license was Peter Abbott, whose background they knew disqualified him for a license.[20]

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[20] On May 24, 1980, Scarborough reported to Abbott that Onett had read the entire application, and when asked what Onett had said, Scarborough responded as follows:

> Scarborough: He [Onett] said the man's in business. So what do you care, so [expletive deleted] up. He said but I gotta know. But you don't want too many people, you understand what I'm saying. He said, the guy's got something going,

Onett nevertheless assured Peter Abbott that he would obtain the license.[21] On July 17, 1980, Onett and Scarborough held a discussion in which they noted that because Peter Abbott was a convicted felon, they were placing Peter Abbott's assets in Jean's name. Onett was also present when Scarborough introduced Peter Abbott as the owner of the restaurant. On March 30, 1981, Onett testified to the grand jury that

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but [expletive deleted] it, that's no problem, we can still get the license.

[21] On July 17, 1980, Abbott and Onett had the following conversation:

Abbott: I just want my license.
Onett: That's the, that's the only reason I'm here, this is our relationship.
Abbott: That's all I want.
Onett: To get the damn thing processed.
Abbott: When my license comes, pay you the money.
Onett: Right, that's our deal.

it was clear to him on July 17, 1980 when he visited the restaurant that Peter Abbott was "running the whole show." He also testified that he had never met Jean Abbott. Yet on July 28, 1980, Onett advised Abbott that he had visited with Abbott and his wife and spent time at the restaurant. He had further advised the Beverage Department that Abbott was going to run a legitimate place. Thus, Onett continued to fraudulently and affimatively misrepresent to beverage officials the true status of Abbott's involvement in the restaurant after a point in time at which Onett admits knowing the true status of the operation of the restaurant. Moreover, before the grand jury, Onett testified

that he understood the Florida statutory requirements of disclosure in liquor license applications.

The government was also required to prove that the mails were used and that the defendant used or caused the use of the mails. United States v. Hartley, 678 F.2d at 985. Here the mails were used when the applications were mailed from the Jacksonville office of the Beverage Department to the Tallahassee office. Like Haimowitz, Onett "caused" the mails to be used for he was aware that the liquor license applications would be transmitted by mail between the two offices. See Pereira v. United States, 347 U.S. 1, 8-9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954).

Thus, Onett conspired with Haimowitz and Scarborough to defraud and to unlawfully obtain property in violation of 18 U.S.C.A. § 371. Having conspired in the scheme, he unlawfully and willfully caused the liquor license application to be sent and delivered by the United States Postal Service in violation of 18 U.S.C.A. § 1341. Therefore, we hold that there was sufficient evidence to sustain Onett's conspiracy and substantive mail fraud convictions.

Onett also argues that he should have been acquitted of the conspiratorial and substantive extortion charges under 18 U.S.C.A. § 1951[22] (Counts Two and Four). Onett

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22 See supra note 11 for the text of § 1951.

contends that since Abbott was a member of the alleged conspiracy, Abbot could not at the same time be the victim of the extortion conspiracy. As noted in our discussion of Haimowitz's claims, however, the threat of failing to obtain a liquor license was reasonably calculated to instill fear of economic loss in Abbott. We hold that there was sufficient evidence to prove Onett's role in the extortion scheme. We also hold that, as we stated with respect to Haimowitz, extortion "under color of official right" was proved, and the effect on commerce required by the Hobbs Act was shown.

Second, Onett contends that the district court's finding of guilt with respect to the perjury counts requires reversal. Counts Eighteen and Nineteen

allege that Onett, while a witness and under oath before a federal grand jury, knowingly and willfully made false and material declarations. Specifically, under Count Eighteen, Onett testified that he did not discuss with Peter Abbott: 1) that there might be news clippings out about Abbott; 2) that Onett was going to get a copy of those news clippings from Kenneth Ball; and 3) that Onett had information from a newspaper article and otherwise that Abbott was an informer for the FBI.[23]

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[23] Onett's grand jury testimony was as follows:

> Q. Did you discuss with Mr. Abbott himself the fact that there might be news clippings out about him?
> A. No, sir.
> Q. You never did at all?
> A. No, sir.
> Q. Did you ever tell Mr. Abbott that you were going to get copies of those news clippings from Kenneth Ball?

The Count alleges that such testimony was false because on or about July 17, 1980, Onett was videotaped discussing the three subjects with Abbott.[24] Under Count Nineteen, Onett testified

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A. No, sir.
Q. You never told Mr. Abbott that you had information from a newspaper article or otherwise, that he was an informer for the FBI?
A. No, Sir. No, sir ....

[24] Pertinent portions of the videotaped conversation are quoted below:

Onett: ... Ah, he [Haimowitz] heard about this newspaper article out in Alabama. Okay that shook the [expletive deleted] out of him. I says, hey, I don't care what the guy does. Don't you know, have you seen the article?
Abbott: No.
Onett: Oh, they had you as an informer for the FBI and, uh ...
Abbott: Have you seen the article?
Onett: Uh, they have in Tallahassee.
Abbott: Have you gotten to see it?
Onett: No, that Kenny Ball's gonna show it to me when I go up next week.
Abbott: I've never seen the

to the grand jury that while in the office at Abbott's Restaurant, Jacksonville, Florida, on or about July 17, 1980, he told Peter Abbott that he wanted to meet Pete Abbott's wife and

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article. As far as I know, I was never there.
Onett: Might be another Peter Abbott. Sure sounds like you (laughing) with the background. Massachusetts and the whole thing.

* * * * * *

Abbott: Have you talked to them about that, that Alabama thing or have you, have you ...
Onett: All they did was tell me that they had a newspaper article from Alabama.

* * * * * *

Onett: ... Tell ya, I'll ge, get that newspaper article and get you a copy of it.
Abbott: Can you get a copy of it?
Onett: Oh, [expletive deleted], I'll make 'em give me a copy.
Abbott: Will he give us one?
Onett: Sure, if they're gonna throw it in my kisser, I'm gonna say I wanna copy of it.
Abbott: Has he thrown it in your kisser yet?
Onett: Well, he said he wants me to see it.

* * * * * *

was insistent that he meet her.[25] The Count alleges that a videotape made of the coversations proves that such testimony was false.[26]

Abbott: Let me ask you a question. When did Ball tell you that I, there was something from Alabama?
Onett: About a week ago. Said they got a newspaper article I want you to see on your, on your client. I said what client. He said Peter Abbott. I said I don't represent Peter Abbott, you dumb [expletive deleted], I represent his wife. And he says, well I thought you might be interested in seeing it. I said hold it, I'll see it when I get to Tallahassee.

[25] Onett's grand jury testimony was as follows:

Q. Did you go to the restaurant?
A. Yes.
Q. Did you meet Jean Abbott?
A. She was not there.
Q. Who did you meet?
A. I met Mr. Abbott.
Q. Where did you meet with him?
A. He came over to the table. After dinner he showed me around, then he said he wanted to talk to me and he took me into his office.
Q. Okay, and that appeared to you to be in his office during your

Three elements are essential to prove a perjury charge: 1) that defendant in fact made the particular statements to the court proceeding; 2) that defendant knew the statements to

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discussions with him?
A. Yeah, I says, "Where is your wife?" He says, "Well, she's very sorry but she had some problems and she couldn't come here tonight." So I says, "Well, I really came up here to meet her, I want to meet her." And I says--
Q. Where did you tell him this?
A. Sitting in his little cubicle of an office, a very small office.
Q. In his office?
A. Yes, just the two of us were there. He was sitting behind the desk.
Q. And, you told him then that you wanted to meet his wife?
A. Yes. My whole intentions were to meet with his wife and he sloughed it off like it wasn't important, she just couldn't be there.

* * * * * *

Q. And, at that meeting were you insistent that you should be able to meet with her?
A. Yes.

26 A review of the transcript of the

be false when they were made; and 3) that the statements were material to the grand jury or other court proceeding's investigation. 18 U.S.C.A. § 1623; United States v. Cosby, 601 F.2d 754, 756 (5th Cir. 1979). Onett contends that the questions posed by the prosecutor leading to Counts Eighteen and Nineteen were sufficiently vague as to prevent the finder of fact from concluding beyond a reasonable doubt that Onett knowingly answered falsely.[27] We

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taped conversation reveals that Onett never asked to see Jean Abbott.

[27] With regard to Count Eighteen, Onett argues that he truthfully testified that he did not discuss with Abbott that there might be newsclippings about Abbott because on the videotape, he unequivocally stated that Abbott was in the article. The "might" referred to the fact that the article might refer to a different Peter Abbott. Onett also claims that

recognize that "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." Bronston v. United States, 409 U.S. 352, 360, 93 S.Ct. 595, 601, 34 L.Ed.2d 568 (1973). Nevertheless, we believe that the quoted passages from Onett's testimony, when compared to his actual statements on tape, show that the prosecutor's questions were sufficiently precise and that Onett's answers were not literally true.[28] See

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he truthfully told the prosecutor that he was not going to get copies of those news clippings because on the videotape, Onett said he was going to see copies of the articles.

With regard to Count Nineteen, Onett contends that the word "insistent," which the prosecutor used in a question to Onett, was vague. Onett also contends that he could have asked to see Mrs. Abbott while he was entering the room and the video recording machine was turned off.

[28] Onett also claims that at the time

United States v. Crippen, 570 F.2d 535, 537-38 (5th Cir. 1978), cert. denied, 439 U.S. 1069, 99 S.Ct. 837, 59 L.Ed.2d 34 (1979). Thus, we affirm the perjury convictions under Counts Eighteen and Nineteen. Compare Bronston v. United States, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973) (perjury conviction reversed where answer literally true but unresponsive); United States v. Brumley, 560 F.2d 1268 (5th Cir. 1977) (perjury conviction failed for lack of specificity, for lack of critical question, and for lack of an unequivocal answer).

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the July 17, 1980 conversation was videotaped, Onett was intoxicated, thus suggesting that his ability to recall events was adversely affected. The district court judge, however, who saw the tape, found that Onett's demeanor on tape was not that of an intoxicated person.

Onett's third claim is that the district court erred in failing to suppress the results of electronic surveillance, which was conducted in violation of the fourth amendment. The electronic surveillance consisted of visual and aural recordings made of various meetings and telephone conversations. Peter Abbott gave the FBI blanket permission to record his conversations with defendants and he was a party to all of the taped conversations. The FBI supervised the recordings, although Abbott had full control over the switch that turned the recorders on and off. Abbott had no other access to the recording equipment and steps were taken to insure that Abbott could not tamper with the tapes. After a recording, an agent would

retrieve the tape. Abbott failed to record one conversation with Haimowitz that the FBI requested he record.

Under 18 U.S.C.A. § 2511(1), the interception or oral or wire communications is prohibited and is a criminal offense, except as governed by specific exceptions to that statute. Under 18 U.S.C.A. § 2515, the use as evidence of a communication which does not come within one of the exceptions is prohibited. In this case, the government relied on one of the exceptions, described in 18 U.S.C.A. § 2511(2)(c), to over the prohibition:

> (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the

communication or one of the parties to the communication has given prior consent to such interception.

Onett raises two issues: 1) whether Abbott was acting "under color of law" within the meaning of section 2511(2)(c), and 2) even if Abbott was acting "under color of law," whether such warrantless electronic interceptions are proscribed by the fourth amendment.

Onett argues that Abbott did not act "under color of law" within the meaning of section 2511(2)(c) because Abbott recorded conversations outside the presence of government agents and with control over the one and off switch to the equipment. Courts have established that informants who record private conversations at the direction of

government investigators are "acting under color of law." See e.g., United States v. Shields, 675 F.2d 1152, 1156-57 (11th Cir.), cert. denied, --- U.S. ---, 103 S.Ct. 130, 74 L.Ed.2d 112 (1982); United States v. Shedan, 651 F.2d 336, 337 (5th Cir. 1981). Thus, the question in this case is whether Abbott was acting at the direction of the government when he recorded the conversations. In United States v. Shields, 675 F.2d 1152, the defendant hired a private detective to help him tape conversations between his codefendant and him. The private detective went to the FBI, and the FBI provided the detective with recording equipment. The private detective went to the FBI, and the FBI provided the detective with recording equipment.

The defendant wore the recorder, and the detective, not the FBI, controlled the recording equipment. Nevertheless, the court held that the private detective was acting under color or law when he recorded the conversations. See also United States v. Salisbury, 662 F.2d 738 (11th Cir. 1981), cert. denied, 457 U.S. 1107, 102 S.Ct. 2907, 73 L.Ed.2d 1316 (1982) (defendant did not dispute that informant acted under color of law when informant received and recorded telephone calls); United States v. Tousant, 619 F.2d 810 (9th Cir. 1980) (informant who was apparently operating the recording equipment was acting under color of law); United States v. Rich, 518 F.2d 980 (8th Cir. 1975), cert. denied, 427 U.S. 907, 96 S.Ct. 3193, 49 L.Ed.2d

1200 (1976) (informant acted under color of law when he recorded a call outside the presence of federal agents). Therefore, although the FBI was not present when Abbott recorded conversations, Abbott was still acting under color of law. As such, the recordings were properly made under 18 U.S.C.A. § 2511(2)(c), and under 18 U.S.C.A. § 2517, the conversations could be disclosed to the grand jury.

Onett's argument that such warrantless electronic interceptions are proscribed by the fourth amendment is without merit. An individual has no legitimate expectation that the person to whom he is speaking will not relate the conversation to the legal authorities, either by repetition or by the recording of the conversation. See

United States v. CaCeres, 440 U.S. 741, 750-51, 99 S.Ct. 1465, 1470-71, 59 L.Ed.2d 733 (1979); United States v. White, 401 U.S. 745, 749-51, 91 S.Ct. 1122, 1124-25, 28 L.Ed.2d 453 (1971) (plurality opinion); United States v. Davanzo, 699 F.2d 1097, 1100 (11th Cir. 1983); United States v. Salisbury, 662 F.2d 738, 740 (11th Cir. 1981), cert. denied, 457 U.S. 1107, 102 S.Ct. 2907, 73 L.Ed.2d 1316 (1982).

Lastly, Onett claims that the district court admitted various statements of alleged coconspirators in violation of Rule 801(d)(2)(E) of the Federal Rules of Evidence. According to Onett, the declarations by his alleged coconspirators should not have been admitted in evidence at trial because the government failed to prove

by independent evidence that Onett participated in the conspiracy and failed to prove that the declarations were in furtherance of the conspiracy. See United States v. James, 590 F.2d 575, 578 (5th Cir.) cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). The district court's finding is a factual determination that is reversible only if shown to have been clearly erroneous. United States v. Hawkins, 661 F.2d 436, 450 (5th Cir. 1981), cert. denied, 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982). Upon review of the record, we cannot say that the court clearly erred in admitting the statements.

V. CONCLUSION

We AFFIRM defendants' convictions on each Count on which they were found guilty in the district court, with the exceptions of the convictions of Haimowitz and Scarborough on Count Five, which we REVERSE.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 81-65-Cr-J-JHM

UNITED STATES OF AMERICA

v.

HAROLD HAIMOWITZ,
DAN SCARBOROUGH,
GEORGE L. ONETT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND VERDICT

This cause, having come on for trial before the Court without a jury pursuant to the waiver of jury trial by the United States and all defendants, and the matter having been heard by the Court, and the Court having had an opportunity to hear and evaluate the testimony of the witnesses and to determine the weight and credibility to be attached to such testimony, and

having had an opportunity to examine the exhibits, and having heard the arguments of counsel, the Court now makes the following findings of fact and conclusions of law. Having previously entered a judgment of acquittal in favor of the defendant, Louis H. Ritter, Sr., the Court will limit its findings and conclusions to the remaining defendants.

The Charges

1. In Count 1, each of the defendants is charged with a conspiracy to defraud by using and causing to be used the United States Postal Service, in violation of 18 U.S.C. §§371 and 1341.

2. In Count 2, each of the defendants is charged with a conspiracy to obstruct interstate commerce by extortion, in violation of 18 U.S.C. §1951.

3. In Count 3, the defendants, Haimowitz and Ritter, are charged with obstruction and attempted obstruction of interstate commerce by extortion, in violation of 18 U.S.C. §§1951 and 2.

4. In Count 4, the defendants, Haimowitz, Scarborough and Onett, are charged with obstruction and attempted obstruction of interstate commerce by extortion, in violation of 18 U.S.C. §§1951 and 2.

5. In Count 5, the defendants, Haimowitz and Scarborough, are charged with obstruction and attempted

obstruction of interstate commerce by extortion, in violation of 18 U.S.C. §§1951 and 2.

6. In Counts 6 through 8 and 10 through 12, the defendant, Haimowitz, is charged with mail fraud, in violation of 18 U.S.C. §§1341 and 2. The Court previously granted a judgment of acquittal in favor of Haimowitz as to Count 13.

7. In Count 9, the defendants, Haimowitz and Onett, are charged with mail fraud, in violation of 18 U.S.C. §§1341 and 2.

8. In Counts 18 through 20, the defendant, Onett, is charged with perjury, in violation of 18 U.S.C. §1623.

Findings of Fact

The Court will preface its findings of fact with a brief statement regarding the credibility of one of the government's prime witnesses, Peter Abbott, a/k/a Peter Abate, a/k/a Peter Aver, a/k/a Peter Auer, a/k/a Peter Alcott, a/k/a Peter Ludwig. During the trial, the Court commented in open court upon the credibility of this witness and will not dwell on the subject here. Suffice to say that Peter Abbott admitted to having defrauded from six to twelve banking institutions of between $300,000 and $750,000, that he had six larceny convictions, that he participated in two previous Small Business Administration loan frauds, that he participated in two arsons, that he

participated in narcotic sales, and after his arrival in Jacksonville, he participated in a fraudulent Small Business Administration loan and numerous other bad acts, for all of which he was granted governmental immunity. He pled guilty to interstate wire fraud in or about January 1981, for which he has not been sentenced. He has also used different social security numbers illegally. The Court places no stock in the truthfulness of his testimony except for that in which the truth is obvious.

The Court finds that Peter Abbott traveled to Jacksonville from Atlanta, Georgia prior to October 1979. Thereafter, the following chronology of events occurred.

October-November 1979 - Peter Abbott was referred to the defendant, Harold Haimowitz, a practicing lawyer in Jacksonville, Florida. Haimowitz referred Abbott to one Estafion for the purpose of examining certain restaurant properties with a view toward Abbott's purchase of such properties. Together, Abbott and Haimowitz examined Swain's Restaurant in Jacksonville, Florida.

November 24, 1979 - Abbott met Robert Flude, an alleged expert in preparing Small Business Administration loan applications, in Atlanta, Georgia.

November 29, 1979 - Abbott executed, as purchaser, a contract to purchase Swain's Restaurant and provided Haimowitz with the $3,000 down payment which Haimowitz paid to the seller.

December 1, 1979 - Abbott called Haimowitz from Flude's office in Atlanta, Georgia and discussed the need for a resume because Haimowitz was to have an ownership interest in the restaurant to be operated as Abbott's Restaurant. Haimowitz refused to provide a resume.

December 4, 1979 - The Florida National Bank rejected Abbott's SBA loan application after conducting a routine investigation and failing to confirm the necessary particulars. At Peter Abbott's request, Haimowitz picked up the application papers for the transfer of an alcoholic beverage license from the Jacksonville office of the Beverage Department of the State of Florida.

December 7, 1979 - Abbott again called Haimowitz from Flude's office in Atlanta, Georgia and discussed his concern regarding the rejection of his application. Haimowitz advised Abbott that he could assist in obtaining approval of the loan from other banking sources.

December 10, 1979 - The loan application papers were presented to American National Bank in Jacksonville, Florida. The application was executed December 9, 1979, in Haimowitz' office and reflected Haimowitz as a 10% owner.

December 11, 1979 - Haimowitz accompanied Peter Abbott's wife, Jean Abbott, to the Jacksonville office of the Beverage Department, whereupon Jean Abbott executed a personal questionnaire and provided the

Department with her fingerprints. Although the Articles of Incorporation for Abbott's Restaurants, Inc. reflect execution on this date, they were actually signed on January 3, 1980, one day prior to the loan closing, and hand-delivered by Haimowitz' daughter to Tallahassee, Florida. Jean Abbott's name was signed to the Articles of Incorporation by Peter Abbott in the presence of Haimowitz, and the signature was notarized by Haimowitz' secretary at his request.

December 13-14, 1979 - The President of American National Bank insisted to Abbott that Haimowitz' interest in the restaurant be removed from the loan application. This was accomplished.

December 17, 1979 - American National Bank approved the loan reflecting a 50% ownership interest in each of Peter and Jean Abbott.

January 3, 1980 - The Articles of Incorporation of Abbott's Restaurants, Inc. were signed by Peter Abbott in the presence of Haimowitz, and backdated to December 10, 1979. The signature of Jean Abbott was forged to the Articles of Incorporation.

January 4, 1980 - The SBA loan was closed for the purchase of Swain's Restaurant, and Haimowitz assisted Jean Abbott in executing the documents to reflect her 100% ownership of the restaurant.

February 27, 1980 - Haimowitz accompanied Jean Abbott to the Beverage Department in Jacksonville, Florida and

filed applications for a temporary liquor license and permanent transfer of the liquor license. The officer in charge of the Beverage Department advised Haimowitz as to procedures for processing the applications, including the fact that all correspondence and applications must be mailed from the Jacksonville office to the Tallahassee office.

March 5, 1980 - Jean Abbott moved to Jacksonville, Florida from Atlanta, Georgia.

March 12, 1980 - An investigator from the Beverage Department made an on-site inspection of Abbott's Restaurant, at which time Peter Abbott advised the investigator that he was divorced. Abbott reported this conversation to Haimowitz, and

Haimowitz and Jean Abbott proceeded to the restaurant. Haimowitz advised Abbott that he should not tell the beverage officials that he was divorced because they could determine the falsity of the allegation, but rather he should tell them that he (Abbott) and his wife were separated and going to get divorced.

March 13, 1980 - The first temporary liquor license was issued to Abbott's Restaurants, Inc. The fee for the temporary license was provided to Haimowitz by Peter Abbott.

March 14, 1980 - The application for the first temporary liquor license was mailed to Tallahassee, Florida. Thereafter, Abbott met with the defendant, Ritter, in Haimowitz' office.

March 18, 1980 - Peter and Jean Abbott purchased a home in Jacksonville, Florida as tenants by the entirety for the sum of $92,000, at the closing of which Haimowitz was present. On this date Abbott also received a telephone call in Haimowitz' office from a bank official who advised that the investigator for the Beverage Department had been at the bank checking into the SBA loan records.

March 25, 1980 - Abbott paid Ritter $1,000 in the form of a check for Ritter's services in assisting Abbott to obtain the transfer of the liquor license.

During the last part of March, 1980, the restaurant opened for business. It was also during this period of time that Abbott was called to Boston,

Massachusetts to testify in another case. While in Boston Abbott discussed his Jacksonville problems with Special Agent McGeorge of the Federal Bureau of Investigation.

April 2, 1980 - The investigator for the Beverage Department met with Haimowitz at the latter's office to examine the corporate books of Abbott's Restaurant. Haimowitz denied that Peter Abbott had any interest, direct or indirect, and advised the investigator that the books were not ready but that they would be provided at a later date. Haimowitz bragged about his association with the defendant, Scarborough, whose photograph appeared in Haimowitz' office.

April 4, 1980 - Haimowitz prepared affidavits for execution by Peter and Jean Abbott, which provided that Peter Abbott had no interest in the restaurant and would not continue to sign checks on the restaurant account. Nevertheless, Abbott continued to sign many more checks, including some to Haimowitz, and the original check for a second temporary liquor license fee. Haimowitz filed the aforementioned affidavits with the Beverage Department and met with the supervising officer of the Beverage Department at which time he repeated that Peter Abbott had no interest in the restaurant business. The supervisor thereupon pointed out the statutory requirement of disclosure of all interested parties to Haimowitz. Haimowitz also told his secretary, upon

her inquiry, that the reason for placing everything in Jean Abbott's name was that Peter Abbott was a convicted felon and that this information should remain secret.

April 8, 1980 - The application for the permanent beverage license transfer was mailed from the Jacksonville office of the Beverage Department to its office in Tallahassee.

April 11, 1980 - Peter Abbott had his first meeting with a Jacksonville-based special agent of the FBI.

April 14, 1980 - After having been told to keep quiet and follow Haimowitz' instructions, Peter Abbott was taken to the Jacksonville beverage office by Haimowitz to be fingerprinted. Haimowitz advised Abbott that even if the fingerprint

investigation came back positive, it would not be of any concern because all of the paperwork reflected that Peter Abbott had no interest in the restaurant. The supervisor of the Beverage Department had already recommended rejection of the license application on April 7, 1980, because of what he felt was the undisclosed interest of Peter Abbott. He had insisted to Haimowitz that Abbott be fingerprinted.

April 22, 1980 - The application for transfer of the license was disapproved and a certified letter mailed to the restaurant from Tallahassee, Florida. Thereafter, the disapproval was conveyed to the Jacksonville office of the Beverage Department, and on April 25, 1980, the Beverage Department

agents attempted to pick up the temporary license from Abbott's Restaurant. Abbott contacted Haimowitz, who obtained a temporary injunction late on the afternoon of April 25, 1980, from a State Court judge.

April 28, 1980 - The director of the Beverage Department, Charles Nuzum, was advised by the special agent in charge of the Jacksonville office of the FBI that Peter Abbott was a participant in the witness protection program. Nuzum instructed Ball, an employee in the Beverage Department, to place any news clippings regarding Abbott in their criminal (confidential) file.

April 30, 1980 - Nuzum met with Special Agents Collins and Wisnovski in his office in Tallahassee, Florida to

discuss Peter Abbott's status in the witness protection program and the FBI's involvement in the operation of Abbott's Restaurant. They also displayed a RAP sheet on Abbott to Nuzum. Nuzum also received word that Haimowitz had scheduled an appointment with him for the following day, May 1, 1980.

May 1, 1980 - The defendants, Haimowitz and Ritter, met with Nuzum and attorney Watson in Tallahassee. Nuzum advised the defendants of the Department's concern regarding the liquor license application, and instructed them that the application must be amended to accurately reflect the true source of funds used to acquire the restaurant, all parties interested, directly or indirectly in

the restaurant, and that they must clarify the marital status of Peter and Jean Abbott. Haimowitz asked Nuzum if he had any newspaper clippings regarding Abbott, and Nuzum replied in the negative, having been advised by the FBI to keep such clippings in their confidential file. Thereafter, Haimowitz met with the defendant, Scarborough, in the latter's legislative office. Scarborough at the time was a State senator from the Jacksonville, Duval County, Florida area and was President Pro Tem of the Florida Senate. Scarborough suggested to Haimowitz that Haimowitz contact the defendant, Onett, for assistance in obtaining the transfer of the permanent liquor license. Because of a conflict in the testimony between Scarborough

and Haimowitz regarding when Onett was contacted, the Court must determine when that contact was made. The only logical inference is that contact was made by telephone from Scarborough's office at the time Haimowitz met with Scarborough.

May 3-4, 1980 - Haimowitz met with Abbott and advised the latter of his meeting with Scarborough. He further advised Abbott that Scarborough would obtain the services of Onett, that Onett had wanted $25,000, and that Haimowitz had talked him down to $20,000, and that Scarborough had further "muscled" him down to $15,000.

May 6, 1980 - The defendant, Onett, briefly met with Nuzum in the Capitol Building and advised Nuzum that he, Onett, was working with Haimowitz on

the Abbott's Restaurant application. Onett is a lawyer, licensed to practice in the State of Florida, but confines his practice primarily to lobbying activities in Tallahassee, Florida.

May 7, 1980 - The FBI commenced its undercover operation with the first of several audio and visual tape recordings. The first was an audiotape of a recording in Haimowitz' office between Haimowitz, Scarborough and Onett, wherein the latter were recorded by way of a speaker telephone. On this date, pursuant to instructions from Onett, a "Save Harmless Agreement" was executed by Peter Abbott in furtherance of his contention that he had no interest in the restaurant ownership.

May 8, 1980 - An amended application for transfer of the permanent liquor was filed by Haimowitz in the Jacksonville office of the Beverage Department. Jean Abbott accompanied Haimowitz to the office and was instructed by Haimowitz to let the latter do the talking. Also on this date, Onett met with Nuzum in the latter's office in Tallahassee. Nuzum advised Onett of the same matters which he had accomplished in order to obtain approval of the license transfer application. Onett advised Nuzum that Peter Abbott had no ownership interest, direct or indirect, in the restaurant operation.

May 12, 1980 - The amended application for license transfer was mailed by the Jacksonville office of the Beverage Department to its Tallahassee office.

May 13, 1980 - Haimowitz met with Abbott in the latter's office, at which time Haimowitz advised Abbott not to tell Abbott's wife that he was "paying off" for the liquor license.

May 20, 1980 - In a recorded telephone conversation from Abbott's apartment to Haimowitz at a Jacksonville restaurant, Haimowitz advised Abbott how to phrase his conversation with Senator Scarborough when they were to meet with the Senator later that week. Haimowitz also advised Abbott that the Senator was upset because Abbott had not yet paid

the $15,000. Also on May 20, 1980, Haimowitz mailed a letter to the Beverage Department in Tallahassee requesting a hearing on the rejection of the beverage license.

May 24, 1980 - The first videotape of the undercover operation was made in Abbott's office, at which time Peter Abbott was displayed as counting $7,500 in denominations of $10 and $20 bills. The money was placed in a manilla envelope and handed to Haimowitz, who ultimately left the restaurant carrying the manilla envelope. After receiving instructions from Haimowitz not to approach the subject at that time, Scarborough insisted and made a demand on Abbott for a $1,000 campaign contribution in the form of a company check when he ran for office. At the

time, Scarborough was preparing to file for reelection. Also on May 24, 1980, Scarborough dined at the restaurant as the guest of Peter Abbott.

June 4, 1980 - Peter Abbott executed a $100 check for the second temporary liquor license.

June 10, 1980 - Jean Abbott executed a check for $100 to replace that which was executed by Peter Abbott on June 4, 1980.

During the second week of June 1980, the legislature adjourned and the defendant, Ritter, obtained copies of Huntsville, Alabama newspaper clippings regarding Peter Abbott. Ritter then discussed the newspaper clippings with Haimowitz and Scarborough.

June 13, 1980 - The second temporary liquor license was issued for Abbott's Restaurant.

June 16, 1980 - Scarborough was videotaped at Abbott's Restaurant, and Haimowitz returned from a 2-1/2 week European trip.

June 18, 1980 - The application for the second temporary liquor license for Abbott's Restaurant was mailed from Jacksonville to Tallahassee, Florida.

June 20, 1980 - There was a telephone tape of a conversation between Scarborough and Abbott, wherein Scarborough stated that he and Onett intended to go to the restaurant to meet with Abbott.

June 25, 1980 - There was an audio telephone tape of a conversation wherein Abbott contacted Scarborough

and Onett at Scarborough's office in Tallahassee. Onett reported that he had told Mr. Ball of the Beverage Department that Peter Abbott was not involved with the restaurant operation, and Scarborough reported that he had delivered the new application to Onett.

During the end of June 1980, Mr. Nuzum advised his superior, Mr. Burroughs, that the FBI had an undercover operation at Abbott's Restaurant. A meeting was arranged with the FBI in Jacksonville for July 7, 1980.

July 2, 1980 - Onett had his secretary hurriedly type a letter receipt to Jean Abbott for the $7,500 cash paid by Abbott on May 24, 1980. The letter was not delivered until July 17, 1980.

July 7, 1980 - The special agent in charge of the FBI office in Jacksonville met with Mr. Nuzum and Mr. Burroughs in Jacksonville.

July 9, 1980 - Scarborough called Haimowitz and Onett called Haimowitz.

July 16, 1980 - An audiotape of a telephone conversation was recorded in which Scarborough advised Abbott that he, Scarborough, was going to the restaurant the next day with Onett.

July 17, 1980 - A videotape was recorded wherein Onett and Scarborough met with Peter Abbott. Scarborough told Abbott that if the grand jury should ask Mr. Nuzum that Nuzum could state that Scarborough's office had never contacted him. Onett, Scarborough and his wife, and others had dinner at Abbott's Restaurant, at

which time Onett and Scarborough discussed with Senator Skinner that Peter Abbott was a "bad guy" and in the "Mafia." They also reported that they were attempting to place all of Peter Abbott's assets in his wife's name. Upon departing the restaurant, Skinner was introduced to Abbott by Scarborough as the owner of the restaurant. Scarborough and Skinner drove Onett to his hotel and proceeded on to Mayport, Florida, at which time Skinner asked Scarborough if the matters concerning Peter Abbott would cause Scarborough problems in his upcoming campaign. Scarborough responded that they would, but that he "could handle it."

July 18, 1980 - An audio telephone tape was recorded in which Haimowitz confirmed to Peter Abbott that Peter

Abbott would get his money back if Onett was not able to obtain the permanent liquor license.

July 28, 1980 - An audio telephone tape was recorded in which Onett reported to Peter Abbott that he had talked to Ball and told Ball that he had met with Peter Abbott and his wife.

August 1980 - Some time in August, approximately the middle thereof, Abbott's Restaurant closed.

August 21, 1980 - The Beverage Department finally disapproved the liquor license transfer application. The FBI executed a search of Haimowitz' office.

August 28, 1980 - A local television channel videotaped an intervew with Scarborough, after which Scarborough was first interviewed by the FBI.

August 29, 1980 - A newspaper article appeared in the major local newspaper in Jacksonville, Florida, reflecting an interview with Scarborough. Scarborough then contacted the FBI and advised Special Agent Collins that he needed additional time to review the statement given the previous day prior to executing it in writing, and that he would meet with Collins the following Tuesday, September 2, 1980. Scarborough was then re-interviewed by the local television station and gave answers which conflicted with those given to

the same station and the FBI on the preceding day. On the videotape he stated that he had not told the truth, but emphasized that he had not been lying.

September 2, 1980 - Scarborough appeared at the FBI office and executed a statement after it had been retyped with the corrections suggested by Scarborough. Thereafter, Onett appeared at the FBI office and provided the FBI with his file on Abbott's Restaurant liquor license application. This file was identical to that which he produced before the grand jury which met on March 30, 1981.

Having found beyond a reasonable doubt that the foregoing scenario of facts is true, the Court further finds as follows:

1. Abbott's Restaurant, Inc., was a Florida corporation engaged in the restaurant business as a supper club in the city of Jacksonville, Florida, and operated the restaurant known as Abbott's Restaurant during the time alleged in the indictment in this case. Peter Abbott owned and operated Abbott's Restaurant as the owner-in-fact of the corporation. Peter Abbott was actively engaged in the management and operation of the restaurant. The defendant, Haimowitz, knew of these facts at all times material to the allegations of the indictment.

2. The allegations contained in Paragraphs 3 through 8 and Paragraphs 10 through 12, all of Count I(A) of the indictment in this cause, have been proved beyond a reasonable doubt.

3. The defendant, Haimowitz, misrepresented to the Beverage Department of the State of Florida that Peter Abbott had no interest, direct or indirect, in the ownership of Abbott's Restaurant, Inc. and that he would not acquire any in the future. Evidence which supports the knowledge of the defendant, Haimowitz, of the ownership interest of Peter Abbott consists of the following:

a. Haimowitz had conversations with Peter Abbott in which they discussed Peter Abbott's ownership interest in the restaurant.

b. Jean Abbott, the purported owner of the restaurant, lacked any experience, expertise, demeanor or executive ability to own or operate a large restaurant facility, all of which

was obvious to Haimowitz. The Court finds it unbelievable that the defendant, Haimowitz, could have harbored any belief that Jean Abbott was the true owner and operator of the restaurant. The Court accepts as true Jean Abbott's statement that she was the owner on paper only.

c. Haimowitz had several meetings with Jean Abbott and at no time did she ever manifest any ownership or management interest in the restaurant.

d. As between Peter and Jean Abbott, Haimowitz directed all inquiries concerning the operation and management of the restaurant to Peter Abbott. Haimowitz testified that on or about May 1, 1980, in order to obtain authorization for expenditures of

$15,000 to obtain the assistance of defendant Onett with regard to the license transfer, he contacted Peter Abbott, not Jean, notwithstanding the fact that Peter Abbott was not (according to the testimony of Haimowitz) the owner, director or a shareholder at that time. Pursuant to the search warrant executed on August 21, 1980, a personal financial statement of Peter Abbott was seized from Haimowitz' office reflecting that Peter Abbott was President and General Manager of Abbott's Restaurant, Inc. The Court reasonably infers that Haimowitz was knowledgeable of the contents thereof.

f. Haimowitz adamantly rejected the suggestion of George Strumlauf, an advertising agent, that Peter Abbott's

alleged impressive background in restaurant management be included on the menu for the restaurant. The Court finds that Haimowitz intended to conceal Peter Abbott's ownership interest in the restaurant.

g. Haimowitz discussed the SBA application with Peter Abbott and Robert Flude. On or about January 4, 1980, Haimowitz complimented Flude on the fine job he had done preparing the SBA package, thereby indicating he had read the same, and the package clearly reflected the ownership interest of Peter Abbott.

h. Although Haimowitz was referred to as Peter Abbott's partner in the restaurant on a number of

occasions, Haimowitz never attempted to correct or reject such characterization.

i. Haimowitz continually instructed Peter Abbott to create an appearance to his employees and others that he was simply a manager-employee.

j. Haimowitz and Scarborough, on May 24, 1980, discussed with Abbott the hiding of his business cards, and both instructed Abbott to maintain a "low profile."

k. Haimowitz drafted the contract for the purchase of the restaurant and witnessed the signing by Peter Abbott as "purchaser" of the restaurant. The funds used for the down payment were provided by Peter Abbott, not Jean Abbott.

4. The Court further finds that the defendant, Haimowitz, during the pendency of the liquor license application believed that Peter Abbott had a felony conviction. This finding is based upon the following facts:

a. Haimowitz had conversations with Onett and others in which it was discussed that the conviction would be "taken" by the state beverage officials as a misdemeanor, thereby indicating knowledge of the fact that it was a felony but would merely be "taken" in the lesser category of a misdemeanor.

b. The felony which allegedly would be "taken" as a misdemeanor was a vehicular homicide. It is inconceivable to the Court that a practicing attorney would consider a vehicular homicide as a misdemeanor,

but in any event, it would certainly cause one to determine the true nature of the crime.

c. On May 9, 1980, Haimowitz met with the staff attorney for the Department of Business Regulations, at which time the staff attorney stated that it was not his understanding that Peter Abbott's vehicular homicide would be considered as a misdemeanor. Haimowitz became upset and immediately attempted to reach the defendant, Onett. The Court finds it reasonable to infer that Haimowitz would not have become upset, but for the fact that Haimowitz believed the true status of the vehicular homicide to be that of a felony.

d. In approximately April 1980, Haimowitz told his secretary, Judi Greenhut, that the reason for placing all of the paperwork and ownership in Jean Abbott's name was that Peter Abbott was a convicted felon.

5. The Court further finds that the defendant, Haimowitz, misrepresented and concealed the amounts and sources of monies invested in Abbott's Restaurant based on the following facts:

a. Haimowitz assisted Peter Abbott in securing almost 100% financing for the restaurant and was aware that Peter Abbott had invested only between $10,000 and $12,000 into the venture.

b. Haimowitz assisted Jean Abbott in completing the personal questionnaire for the Beverage Department, which suggested that the amount to be invested was approximatrely $200,000. Pursuant to an amendment to the beverage license application, a schedule of secured funds was tendered by Haimowitz to the Beverage Department which reported a personal investment of approximately $66,000. Both of these figures were false and known by Haimowitz to be false by virtue of his own testimony that he knew Peter Abbott had actually invested only $10,000 and $12,000.

c. On May 7, 1980, Peter Abbott advised Haimowitz that the Charter Company stock listed on the personal questionnaire executed by Jean Abbott

was not in fact owned by either of the Abbotts. Peter Abbott told Haimowitz that the money invested in the restaurant was "washed money," after which Haimowitz stated: "Now I got to cover that up." Haimowitz did, in fact, cover that up when he filed the schedule of secured funds on May 8, 1980, which schedule failed to report any money as being "washed money."

6. The Court further finds that the defendant, Haimowitz, misrepresented to the Beverage Department of the State of Florida that Peter and Jean Abbott were experiencing domestic difficulties and were contemplating a divorce. This finding is based upon the following:

a. Jean Abbott testified that she did not tell Haimowitz of the existence of any marital difficulties and there were none.

b. Haimowitz visited at the Abbott homes and they visited his. He participated in social functions with the Abbott family, including horseback rides, and on one occasion attended a birthday party for one of the Abbott children. He dined frequently with Jean Abbott at the restaurant, during some of which times they were joined by Peter Abbott. Notwithstanding this relationship, Haimowitz permitted the affidavits of April 4, 1980 to be filed with the Beverage Department. These affidavits were false.

c. On March 18, 1980, just two and one-half weeks prior to the filing of the false affidavits aforementioned, Haimowitz attended the closing on a home purchased by Peter and Jean Abbott jointly as husband and wife, for the approximate sum of $92,000. The Court finds it totally unreasonable that Haimowitz, an experienced attorney, could have concluded that the Abbotts were experiencing marital difficulties. The Court also finds it unreasonable that Haimowitz would have believed that Peter Abbott would relinquish all rights to his investments in his home and restaurant.

d. Haimowitz never discussed filing divorce or separation papers with the Abbotts.

e. On March 12, 1980, Haimowitz advised Peter Abbott not to tell the Beverage Department investigator that he was divorced because Haimowitz could not substantiate that information. In lieu thereof, he advised Peter Abbott to merely suggest that the Abbotts were going to get a divorce.

7. The Court discounts the testimony of the defendant, Haimowitz, for the following reasons:

a. Haimowitz was previously convicted of felony violations.

b. Haimowitz' testimony, if believed, would conflict with the testimony of at least ten other witnesses, including Jean Abbott, Richard Caplano, Judi Greenhut, Ginger

Green, Cleo Kardish, George Strumlauf, Michael Bryant, Joseph Glickstein, Robert Flude and Charles Nuzum.

c. Many internal inconsistencies existed as to the testimony of Haimowitz which causes his testimony to be unbelievable, including his explanation of his lack of knowledge of the terms "skimmed" and "washed" money, his explanation of what the word "payoff" meant to him, his explanation of the May 7th statement about covering up the source of funds, his explanation as to why he purportedly recruited Scarborough to negate the alleged adverse reaction to his support of Shevin for governor, his explanation of the use of the term "pigs," his explanation of having Senator Scarborough muscle Onett down

on his "fee," and his explanation that he had to obtain cash on May 24th because there was no bank open. In fact, as early as May 7th, it was discussed that payment would be in the form of cash, and on May 13th, Haimowitz refused a cashier's or certified check and demanded cash from Abbott.

8. The testimony of the defendant, Scarborough, is not credible. This finding is based on the following facts:

a. Scarborough gave two mutually-inconsistent statements, concerning significant events relating to the allegations in the indictment, on videotape to a local TV channel

reporter. He admitted not having told the truth in the first of the two statements.

b. Scarborough gave two mutually-inconsistent statements to Special Agent Collins, changing his statement after telephonic contact with the defendant, Onett. The first of these statements was on August 28, 1980, and the second on September 2, 1980. It was more than a mere coincidence that Onett appeared in Jacksonville and at the FBI office on the very day that Scarborough delivered his written statement to the FBI office on September 2, 1980. Neither one of these defendants purports to have a recollection of that occurrence. Scarborough admits that Onett may have edited his statement.

c. Scarborough testified that he knew nothing of the beverage license application, whereas on the May 24 video recording he expressed knowledge that a certain problem with regard to a $6,000 loan was the only "hangup." He further reported that he had delivered the application to Onett, who had read the whole application. He repeatedly assured Peter Abbott that he, Peter Abbott, would get "his" license.

d. Scarborough testified that when he told Peter Abbott that he would get all of his money back in the event the license was not issued, this was an assumption on his part as to what attorneys usually did and merely a misunderstanding. This is refuted by his own testimony in that his extensive experience with attorneys he has never

known any attorney to give money back. On June 16, 1980, Scarborough told Abbott that he had discussed with Onett that the fee was contingent on obtaining the license, and that Onett had told him he would have to get the license so he would not have to give back the $7,500.

e. Scarborough's testimony that Haimowitz never asked for his assistance with the Beverage Department is refuted by the May 7th tape in which Haimowitz suggested to Scarborough that Scarborough walk in on a committee meeting with Charles Nuzum. Scarborough responded that he had made a believer out of Nuzum when Scarborough was on the Commerce Committee, and felt that he could ask Nuzum for anything within reason.

f. The Court does not believe Scarborough when he testified that he did not know what "skimmed" money or "washed" money meant. It is inconceivable that one who has spent 12 years in the legislature, voting upon criminal legislation and admittedly being well versed in the law of conspiracy, would not know the meaning of such terms.

g. Scarborough's demeanor on the May 24th videotape is inconsistent with his declarations to Agent Collins that observing the money dumped on the table "scared the fire out of me," and that he wanted to get out of there as fast as he could. This concern was not visible, nor in any way manifested, at the time the money was placed on the desk or during the whole period of time

that the money was counted. Such concern is belied by the fact that he not only stayed, but he also thereafter made a demand for a $1,000 campaign contribution, and he came back later that evening to dine as the guest of Peter Abbott.

9. The Court further finds that the defendant, Scarborough, participated knowingly and willfully in the scheme to defraud the people of Florida through the Beverage Department of Florida. This finding is based on the following facts:

a. Scarborough testified that he felt Peter Abbott had an ownership interest in the restaurant both when he observed him on May 24th and again on July 17. Scarborough knew of the

contents of the application and discussed the existing problems with regard to the application.

b. Scarborough advised Peter Abbott not to "create any more problems than we have to have."

c. Scarborough personally delivered a copy of the application for the liquor license from Jacksonville to Tallahassee as well as the $7,500 in cash.

d. Scarborough knew of the difficulties in obtaining the license, as evidenced by his statement that "It may take some time and it may take some doing because it hasn't started out real good."

e. Scarborough repeatedly assured Peter Abbott that he, Scarborough, would get Peter Abbott his money back if the application was not approved.

f. Scarborough repeatedly assured Peter Abbott that he would get his license, and advised Abbott that the next time he should deal directly with Scarborough because Abbott would save money.

g. Scarborough told Abbott that he was not going to tell him that that's all it's going to cost him.

h. In the presence of Haimowitz, Scarborough told Abbott that he could not make assurances in front of a witness; however, after Haimowitz departed Scarborough did assure Abbott that he would get him his license.

i. After Scarborough participated in a conversation between Abbott and Haimowitz with regard to hiding Abbott's ownership cards, Haimowitz then asked Scarborough to instruct Abbott on how to be "more low profile."

j. Abbott told Scarborough that the source of the money used in making the $1,000 payment to Ritter was "washed" money that Peter Abbott, not Jean, had. The source of the funds invested in the restaurant was one of the matters which concerned the Beverage Department.

k. Scarborough expressed his knowledge of the criminal and improper background of Abbott and the restaurant through the following dialogue:

SCARBOROUGH: Peter, let me tell you something, son. I know a lot more about it than you know I know.

ABBOTT: About this place?

SCARBOROUGH: The whole (blank) thing, and we're going to get your license for you.

1. In the presence of the defendant, Onett, Scarborough and Senator "Pete" Skinner discussed Peter Abbott's being in the Mafia and being a convicted felon. Although Skinner altered his memory from the time he first discussed this matter with the FBI to the time he testified, because of a conversation he had with Onett, the Court accepts his original testimony to the FBI that Scarborough also discussed with him placing the

assets of Abbott's Restaurant in Jean Abbott's name in order that the restaurant could get a license. The Court finds that Skinner's pretrial testimony is more credible than that which he "recalled" at trial. Scarborough also introduced Skinner to Peter Abbott as the "owner" of the restaurant.

m. On May 24, 1980, Scarborough reported to Peter Abbott that both he and Onett were aware that Abbott had involvement with the license and that Abbott had something improper in his background or otherwise which would normally form an impediment to obtaining a liquor license. This is exemplified by Scarborough's recorded testimony as follows:

SCARBOROUGH: He read the whole thing (application).

ABBOTT: What did he say?

SCARBOROUGH: He said the man's in business. So what do you care, so (blank) up. He said but I gotta know. You don't want too many people. You understand what I'm saying. He said, the guy's got something going, but (blank) it, that's no problem. We can still get the license.

n. On May 24, 1980, Scarborough also told Peter Abbott that "I don't care if you made your money as a prostitute," and "Hey, we don't give a (blank) what you do." This

conversation reflects Scarborough's willingness to permit, encourage and assist the concealment of Abbott's ownership interest and background in obtaining the license.

o. Scarborough was aware, and so testified, that one of the principal purposes of the Beverage Department in scrutinizing license applicants is to keep crime figures out of the liquor industry in Florida.

p. Scarborough discussed the "problems" with the application with Abbott and counseled Abbott not to create additional problems. He further advised Abbott that "they" would get the license through if Peter Abbott did not "screw it up."

q. Scarborough stated on July 17, 1980, as follows:

> "Of course the newspaper articles don't mean a damn thing to me, and it don't mean a damn thing to George, it don't mean a damn thing to anybody except the state agency . . . I could care less."

By so stating, Scarborough indicated his knowledge that the concealed information was important to the Beverage Department.

r. Notwithstanding Scarborough's knowledge of the concealments, he continued to participate in the conspiracy to defraud the Beverage Department.

10. The Court finds that the defendant, Onett, was knowledgeable of the contents of the beverage license application and the false representations made therein, based upon the following:

a. On May 7, 1980, Haimowitz and Onett discussed preparing an amendment to the original license application. Onett advised Haimowitz how to complete the amendment by reflecting Peter Abbott having an "outside interest" and that Peter Abbott should be listed simply as an "accommodation endorser and guarantor," and that the Small Business Administration note executed by Abbott was to be "with no recourse against the establishment." On the following day, the amended application containing Onett's suggestions was filed by Haimowitz. In addition, a save harmless agreement was filed with the amended application which, in substance, comported with the release Onett had suggested to Haimowitz.

Onett testified in the grand jury that the save harmless agreement was filed at his suggestion.

b. Onett maintained a personal copy of the amended application in his file. Scarborough reported to Abbott that Onett had read the entire application.

c. Onett told Ball of the Beverage Department that he represented Peter Abbott.

d. Notwithstanding the fact that Onett's copy of the license application did not list Peter Abbott as being an officer, director or shareholder of the corporation, Haimowitz told Onett that he would have to get approval of Onett's "fee" from Peter Abbott.

e. On May 7, 1980, Onett first spoke with Peter Abbott by speaker phone. Haimowitz also participated in the conversation. Haimowitz reported to Onett that Peter Abbott (not Jean) had agreed upon the fee, and Onett responded, "Well, good."

f. Onett never had any conversations, in person or by telephone, with Jean Abbott regarding the beverage license application, or any payments therefor, nor did Scarborough. The only written communication to Jean Abbott was the "receipt" which Onett dated July 2, 1980 and didn't deliver until he did so in person on July 17, 1980, over one and one-half months after he received the alleged fees.

g. On May 24, 1980, Scarborough reported to Abbott that Onett had read the entire application, and when asked what Onett had said, Scarborough responded as aforementioned. The Court concludes that Scarborough and Onett were both knowledgeable of and had discussed the fact that the true applicant for the liquor license was Peter Abbott, who had a background which was disqualifying for the license. They, Onett and Scarborough, nevertheless assured Peter Abbott that he would obtain the license. This is further reflected in a dialogue between Abbott and Onett on July 17, 1980, as follows:

ABBOTT: I just want my license.

ONETT: That's the, that's the only reason I'm here, that it our relationship.

ABBOTT: That's all I want.

ONETT: To get the damn thing processed.

ABBOTT: When my license comes, pay you the money.

ONETT: Right, that's our deal.

h. State Senator Sherrill "Pete" Skinner, on August 11, 1981, gave a statement to FBI Special Agent Collins regarding the events of July 17, 1980. Approximately two days before Skinner was to testify at trial, Onett contacted Skinner by telephone to discuss his testimony. Subsequent to that telephone contact, Skinner withdrew from his statement in two particular areas, to-wit: That on July

17, 1980, Onett and Scarborough discussed that Peter Abbott was a convicted felon and that they were placing Peter Abbott's assets in Jean's name. As previously indicated, the Court accepts the original statement of Senator Skinner and finds that his withdrawal was a mere fabrication predicated upon Onett's telephone contact immediately before trial testimony. Onett and Scarborough had a conversation with Skinner in which they discussed their belief that Peter Abbott was in the Mafia and that he was a convicted felon, possibly involved in the murders of five persons, and that Onett had prepared some type of document, or was going to, which would put all of Peter Abbott's assets into his wife's name in order to obtain the

beverage license. Onett was also present when Scarborough introduced Peter Abbott to Skinner as the owner of Abbott's Restaurant.

i. The videotape recording on July 17, 1980, clearly demonstrates that Onett was knowledgeable that Peter Abbott had an interest in the restaurant and was merely seeking to "hide in the background."

j. On July 28, 1980, some 11 days after having personally met with Abbott on July 17, Onett advised Abbott that he (Onett) had spoken with Ball of the Beverage Department and reported to Ball that Onett had visited with Abbott and his wife and spent time at the restaurant. He had further advised Ball that Abbott was going to run a legitimate place. Thus, Onett

continued to fraudulently and affirmatively misrepresent the true status of Abbott's involvement in the restaurant to beverage officials after a point in time at which Onett himself admits knowing the true status of the operation of the restaurant.

k. Onett understood the statutory requirements of disclosure in liquor license applications. He was aware that the application and records of all resulting investigations would be transmitted by mail from the Jacksonville office of the Beverage Department to its office in Tallahassee, Florida.

12. Abbott's Restaurant, Inc. required a state alcoholic beverage license in order to operate as a supper club. Said license was vital to the

economic wellbeing of the establishment. The particular license sought possessed valuable characteristics such as permitting the restaurant to sell a greater percentage of alcohol as opposed to food, and permitting the installation of a package store on the premises. The license transfer was therefore a substantial and valuable property right, and it was economically vital to the restaurant that it obtain approval of the license transfer by the Beverage Department of the State of Florida.

13. Haimowitz advised Peter Abbott that they should secure the services of then Senator Scarborough because he had a lot of clout. In fact, Haimowitz advised Peter Abbott that Scarborough was so powerful that he had gotten the

Governor to appoint Haimowitz to the Construction Licensing Board of the State. Haimowitz suggested that Scarborough would be able to place pressure on the Director of the Division of Alcoholic Beverages, and Scarborough advised that he had made a believer out of the Director on a prior occasion. Scarborough and Haimowitz discussed with Peter Abbott their willingness to corrupt his (Scarborough's) office and be involved with influence peddling, as reflected in the following conversation:

SCARBOROUGH: Peter, Harold and I came from the same old school and that's the public schools where you had to learn how to add, subtract and divide.

HAIMOWITZ: And the old saying that my daddy used to say, "Little pigs could crawl back to the trough, big pigs get slaughtered."

SCARBOROUGH: That's right. That's right, exactly.

14. Pressure was placed on Peter Abbott to make a payment to Onett in the amount of $15,000, to obtain the liquor license. The transfer of the liquor license is the type of transfer which is frequently handled without the assistance of attorneys. The type of liquor license involved is limited to the precise location where the restaurant exists and cannot be transferred to another location. In the event that the purchasers of a restaurant have nothing in their

background to preclude the transfer, it is normally handled as a matter of course.

15. Haimowitz reported to Peter Abbott that Senator Scarborough was so upset that he was going to quit helping and Haimowitz didn't know what that would mean. This reflected the pressure placed on Peter Abbott to make the payment or risk losing the support of Senator Scarborough and his office to obtain the beverage license. Haimowitz also instructed Peter Abbott to refer to the payment as a "fee" to Onett when discussing the payment by virtue of the fact that the President Pro Tem of the Florida Senate was willing to support his application,

notwithstanding the fact that the President Pro Tem knew Abbott was not qualified for a license.

16. The payment of $7,500 was made in the form of cash, indicative of its extortionate nature. Cash was demanded by Onett one day after Onett commenced doing any work for the application. The Court specifically rejects Onett's testimony that cash was demanded because Haimowitz had advised Onett that Haimowitz would not take a check from Peter Abbott.

17. Onett's file on the Abbott application consisted of two documents, one a copy of the amended application, and the second being a copy of the letter of July 2 reflecting receipt of the $7,500. This, coupled with the amount of time spent by Onett seeking

approval of the license application and the amount of the alleged fee itself, $15,000, reflect its extortionate nature. This is particularly so in light of the fact that transfers of such licenses are frequently accomplished without attorney assistance. Although Onett told Abbott that the $15,000 was the fee which he charged everybody for the same thing, his testimony reflected that he had never handled a similar matter for anyone, nor had he ever charged a fee for such services before. In fact, Onett testified that he would have charged more had there been further administrative proceedings or if a law suit had been required.

18. Onett advised Special Agent Collins that he had made a notation of receipt of the $7,500 on the reverse side of a check stub. Although he could not find the check stub at the time, he further advised Special Agent Collins that he would continue looking for it and forward it to Collins upon retrieving it. Contrary to Onett's testimony, his former Certified Public Accountant for three years, who prepared Onett's returns for the years 1977 through 1979, testified that Onett placed all legal fees and lobbying fees in his law account. The accountant further testified that Onett never used check stubs as a means of recording fees. Onett never found the check stub on the reverse side of which he had allegedly recorded his "fee."

19. Although Scarborough first denied to a local TV channel that he delivered any cash to Onett, he subsequently testified as to how he meticulously hid the money in the trunk of his automobile. Yet, he could not recall how he delivered the money to Onett which he had so meticulously hidden in the trunk of his car. For example, he couldn't recall whether he met with Onett in his secured Senate parking area in the Senate Office Building parking garage in Tallahassee (as he originally told Special Agent Collins) or whether he took the money to his office or left it in the car and sent his aide down to the parking garage to pick it up. Scarborough originally told Agent Collins that he gave the money to Onett in the parking

garage, where Onett opened the envelope and counted the money in his presence, stating that it was correct and thanking Scarborough. Onett then testified that he obtained the envelope from a zippered portfolio in Scarborough's office desk in the absence of Scarborough, and thereupon placed the entire manilla folder containing all of the cash in one of his inside jacket pockets and placing the application in the other inside pocket. The Court finds this testimony beyond belief. The $7,500 cash was all in denominations of $10 and $20 bills. As reflected on the videotape, this quantity of bills, and their bulk, defies belief that all of the money was placed in Onett's inside jacket pocket. In fact, another lobbyist testified

that he observed a substantial amount of cash which Onett withdrew from his inside jacket pocket, but this cash was in a white letter-size envelope. It was obviously immediately after Onett received the money because he told the other lobbyist that he had just received the money from a client who had paid him in cash to get a liquor license. One of two conclusions is necessary. First, Onett did not receive all of the money, or second, Onett received all of the money and then left a portion of it in Scarborough's office. Since Scarborough transported the money and was the only one who handled it from the time he received it until Onett

obtained possession, the Court concludes that Scarborough received a portion of the $7,500.

20. The Court finds that Onett was under oath before the federal grand jury and gave the testimony set forth in Count 18 of the indictment filed herein. Having viewed the video and audio tapes of July 17, 1980, the Court finds that such testimony was false and was knowingly and willfully given by Onett. The Court specifically rejects Onett's defense that on July 17, 1980, he was intoxicated and failed to remember his conversations with Peter Abbott. His demeanor on the videotape was not significantly different from that of his demeanor during trial. In both instances, he was confident and self-assured. His physical actions and

movements were unimpaired, and his speech was clear, precise and coherent. In addition, Onett's professed inability to recall the events of July 17, 1980, are belied by the fact that on April 1982, he contacted by telephone Senator Skinner and specifically advised him of which portions of Skinner's statement to the FBI were false. Skinner's statement dealt specifically with the evening of July 17, 1980. It is noteworthy that Onett never once reported to the grand jury that his memory of the events of July 17, 1980, was clouded because of his consumption of alcohol on that evening. The Court also finds that Onett's testimony before the grand jury

with respect to Count 18 of the indictment was material to the grand jury's investigation.

21. The Court further finds that the defendant, Onett, falsely testified under oath to the grand jury on March 30, 1981, as alleged in Count 19 of the indictment filed herein. Although he testified that he went to Abbott's Restaurant on July 17, 1980, specifically to meet Mrs. Abbott and that he insisted on meeting Mrs. Abbott, a videotape of his meeting with Peter Abbot reveals that at no time did Onett indicate that he wanted to meet Peter Abbott's wife, and that at no time was he insistent on meeting Mrs. Abbott. The Court finds that such

testimony was material to the grand jury's investigation and was knowingly and willfully given by Onett.

22. The Court finds that with respect to Count 20 of the indictment filed herein, the question asked of Onett before the grand jury on March 30, 1981, at which time Onett was under oath, was confusing. The Court cannot find beyond a reasonable doubt that the defendant knowingly and willfully made the false statement as alleged in Count 20 of the indictment filed herein. The Court further finds, however, that the testimony of Onett before the grand jury on March 30, 1981, was false, but that it could well have been a mistake as a result of misunderstanding the question propounded to him.

Conclusions and Verdict

Based upon the foregoing findings of fact, the Court concludes the following:

Count 1 - The defendants, Haimowitz, Scarborough and Onett, from on or about November 1979 to on or about August 1980 did unlawfully, knowingly, willfully and intentionally conspire, combine, confederate and agree with each other and with various other persons, including Peter Abbott, to commit an offense against the United States, to-wit: To use and cause to be used the United States Postal Service by mailing and causing to be mailed matters and things, for the purpose of executing a scheme and artifice to defraud and for obtaining property by means of false and fraudulent pretenses

and representations, in violation of Title 18 U.S.C. §1341. The scheme and artifice was to defraud the citizens of the State of Florida and the Department of Business Regulations and the Division of Alcoholic Beverages and Tobacco, and the officials and employees thereof, of their right to the honest, loyal, faithful, disinterested and unbiased services, actions and performance of official duties of and by the defendant, Scarborough, in his official capacity as a Senator of the State of Florida. The scheme was further to defraud the citizens of the State of Florida and the Department of Business Regulations and the Division of Alcoholic Beverages and Tobacco, and the officials and employees thereof, of the right to have

available and to be made aware of all relevant and pertinent facts and circumstances and to have said officials and employees act on other than materially false and fraudulent information in administering the laws of the State of Florida. The Court further concludes that the defendants, Haimowitz, Scarborough and Onett, sought to obtain and caused to be obtained property, that is, a temporary and permanent alcoholic beverage license and transfer thereof to Abbott's Restaurant, Inc. from the Division of Alcoholic Beverages and Tobacco, by means of false and fraudulent pretenses, representations and promises and the knowing and intentioal concealment of material facts. The Court further finds beyond

a reasonabl doubt that the defendants, Haimowitz, Scarborough and Onett, came to a mutual understanding to try and accomplish a common and unlawful plan, as charged in the indictment. The Court finds that each of the three aforementioned defendants willfully became a member of the conspiracy and that during the existence of the conspiracy, the defendant, Haimowitz, committed at least one of the overt acts alleged. Specifically, the Court finds that Overt Act No. 36, as alleged in the indictment, was committed on May 8, 1980, knowingly and in an effort to effect or accomplish the purpose of the conspiracy.

Accordingly, the Court finds the defendants, Harold Haimowitz, Dan Scarborough, and George L. Onett, guilty of Count 1, as alleged in the indictment, beyond a reasonable doubt.

Count 2 - The Court incorporates by reference its conclusions as set forth under Count 1 above and further concludes that the defendants, Haimowitz, Scarborough and Onett, conspired to induce Peter Abbott and Abbott's Restaurant, Inc. to part with money and other property, that they did so knowingly and willfully by means of extortion and that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

Accordingly, the Court finds beyond a reasonable doubt that the defendants, Harold Haimowitz, Dan Scarborough and George L. Onett, are guilty as charged in Count 2 of the indictment.

Count 4 - The Court finds that on May 24, 1980, the defendants, Haimowitz, Scarborough and Onett, knowingly and willfully induced Peter Abbott to part with property, to-wit: $7,500, by extortion, that such transaction affected interstate commerce, and that the defendants extorted this property from Peter Abbott, with his consent, such consent being induced under color of official right and under fear of economic loss and injury to the business of Abbott's Restaurant, Inc.

Accordingly, the Court finds beyond a reasonable doubt that the defendants, Harold Haimowitz, Dan Scarborough and George L. Onett, are guilty of Count 4 of the indictment.

Count 5 - The Court finds that on May 24, 1980, the defendants, Haimowitz and Scarborough, did unlawfully, knowingly, willfully and intentionally attempt to obstruct, delay and affect, and did cause to be attempted to be obstructed, delayed and affected, interstate commerce by extortion, in violation of Title 18 U.S.C. §1951. The defendants did attempt to obtain from Peter Abbott and Abbott's Restaurant, Inc., a $1,000 campaign contribution, with the consent of Peter Abbott, such consent being induced under the color of official right, in

that the defendant, Scarborough, would wrongfully use and cause to be used his official position as a Senator of the State of Florida to obtain and cause to be obtained the transfer of an alcoholic beverage license for Abbott's Restaurants, Inc., such consent being induced by wrongful use of actual and threatened fear of financial and economic loss and injury to the business of Abbott's Restaurants, Inc.

Accordingly, the Court finds the defendants, Harold Haimowitz and Dan Scarborough, guilty beyond a reasonable doubt of Count 5 of the indictment.

Counts 6, 7 and 12 - The Court finds that on or about the dates set forth in the indictment, the defendant, Haimowitz, having devised a scheme and artifice to defraud and to obtain the

property, that is, a temporary and permanent alcoholic beverage license and transfer thereof, by means of false and fraudulent pretenses and representations, and the knowing and intentional concealment of material facts, all as alleged in Count 1 of the indictment, the conclusions of which are hereby incorporated by reference, did, for the purposes of executing said scheme and artifice, at the location and on the dates set forth in the indictment, unlawfully, knowingly, willfully and intentionally place or cause to be placed in a post office and authorized depository for mail matter, to be sent and delivered by the United States Post Office, the matters and things set forth in the indictment.

Accordingly, the Court finds the defendant, Harold Haimowitz, guilty of Counts 6, 7 and 12 beyond a reasonable doubt.

Count 9 - The Court concludes that on or about the dates set forth in the indictment, the defendants, Haimowitz and Onett, having devised a scheme and artifice to defraud and to obtain property, that is, a temporary and permanent alcoholic berverage license and transfer thereof, by means of false and fraudulent pretenses and representations, and the knowing and intentional concealment of material facts, which scheme and artifice is more fully set forth in Count 1 of the indictment, which part is hereby incorporated by reference, did, for the purpose of executing said scheme and

artifice, at the locations and on the dates set forth in the indictment, unlawfully, knowingly, willfully and intentionally place or cause to be placed in a post office and authorized depository for mail matter, to be sent and delivered by the United States Postal Service, the matters and things set forth in Count 9 of the indictment.

Accordingly, the Court finds the defendants, Harold Haimowitz and George L. Onett, guilty beyond a reasonable doubt of Count 9 of the indictment.

Counts 18 and 19 - The Court concludes that the defendant, Onett, gave the testimony alleged in Counts 18 and 19 while under oath before the grand jury of this Court, that such testimony was false in one or more of the respects charged as to some

material matter in such grand jury proceedings, and that such false testimony was knowingly and willfully given by the defendant, Onett.

Accordingly, the Court finds the defendant, George L. Onett, guilty as charged in Counts 18 and 19 of the indictment beyond a reasonable doubt.

The Court finds the defendant, Harold Haimowitz, not guilty of Counts 3, 8, 10 and 11. The Court finds the defendant, George L. Onett, not guilty of Count 20.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 14th day of May, 1982.

JOHN H. MOORE, II
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Eleventh Circuit

No. 82-3009

D.C. Docket No. 81-65-CR-J-JHM

UNITED STATES of America,

Plaintiff-Appellee,

v.

Harold HAIMOWITZ, Dan Scarborough,
George L. Onett,

Defendants-Appellants.

Appeals from the United States District
Court for the Middle District of
Florida

Before FAY and HENDERSON, Circuit
Judges, and TUTTLE, Senior Circuit
Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida,

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be and the same are hereby, AFFIRMED as to appellant Haimowitz on Counts One, Two, Four, Six, Seven, Nine and Twelve of the indictment, of appellant Scarborough on Counts One, Two and Four of the indictment, and of appellant Onett on Counts One, Two, Four, Nine, Eighteen and Nineteen of the

Entered: March 5, 1984
For the Court: Spencer D. Mercer
Clerk

By: /s/
Deputy Clerk

ISSUED AS MANDATE:
APR 26, 1984
(AS TO HAIMOWITZ ONLY)

United States Court of Appeals
for the Eleventh Circuit

No. 82-3009

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
APR 6 1984
Spencer D. Mercer
Clerk

D.C. Docket No. 81-65-CR-J-JHM

UNITED STATES of America,

Plaintiff-Appellee,

v.

Harold HAIMOWITZ, Dan Scarborough,
George L. Onett,

Defendants-Appellants.

Appeals from the United States District
Court for the Middle District of
Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion March 5, 1984, 11 Cir.,
198_, _____F.2d____).

Before FAY and HENDERSON, Circuit
Judges, and TUTTLE, Senior Circuit
Judge.

PER CURIAM:

(xxx) The petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
United States Circuit Judge

Office - Supreme Court, U.S.
FILED
NOV 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1986

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROLD HAJMOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether there was sufficient use of the United States mails and sufficient evidence of petitioner's participation in a scheme to defraud to support his convictions for mail fraud under 18 U.S.C. 1341.

2. Whether the district court properly required petitioner to announce at the close of the government's case whether he intended to rely on an entrapment defense based on the government's evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1986

HAROLD HAIMOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A100) is reported at 725 F.2d 1561. The findings of fact, conclusions of law, and verdict of the district court (Pet. App. A101-A197) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A198-A200) was entered on March 5, 1984. A petition for rehearing was denied on April 6, 1984 (Pet. App. A201-A203). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Florida, petitioner was convicted on four counts of mail fraud and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C.

371 and 1341, and two counts of extortion and one count of conspiracy to commit extortion, in violation of 18 U.S.C. 1951. He was sentenced to a total of three years' imprisonment, two years' probation, and a $20,000 fine. The court of appeals affirmed the convictions with the exception of one of the substantive extortion counts (Pet. App. A1-A100).[1]

As summarized by the court of appeals (Pet. App. A4-A17), the evidence at trial established that petitioner, a Florida attorney, along with co-defendants Dan Scarborough, a Florida state senator, and George L. Onett, an attorney and lobbyist, engaged in a scheme to obtain a Florida liquor license for Peter Abbott, a person they knew was not qualified to receive such a license because of a prior felony conviction. In late 1979, Abbott sought petitioner's assistance in locating and purchasing a restaurant in Jacksonville, Florida. Although he needed a Small Business Administration loan in order to purchase the restaurant he had chosen, Abbott told petitioner that he would be unable to qualify because he had been adjudicated a bankrupt and had been convicted of vehicular homicide (Pet. App. A6; Tr. 2023). Petitioner responded that there would be no problem, and he prepared a contract for Abbott to purchase the restaurant (Tr. 2023, 2026). In petitioner's presence, Abbott signed the instrument as purchaser and furnished a $3,000 down payment (Pet. App. A27, A140; Tr. 2030).

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[1]Petitioner's co-defendant Dan Scarborough was convicted on both conspiracy counts and both extortion counts. He was sentenced to a total of two years' imprisonment, three years' probation, and a $15,000 fine. The court of appeals affirmed, except with respect to one of the substantive extortion counts. Co-defendant George L. Onett was convicted on both conspiracy counts, one extortion count, one mail-fraud count, and two perjury counts, in violation of 18 U.S.C. 1623. He was sentenced to six months' imprisonment followed by four and one-half years' probation, and a fine of $22,500. His convictions were affirmed. Co-defendant Louis H. Ritter, Sr. was acquitted by the district court on all charges against him. Citations to the transcript and exhibits are based upon those contained in the government's brief in the court of appeals.

Following approval of the loan, petitioner and Abbott discussed obtaining a liquor license for the restaurant venture. When Abbott reminded petitioner of his felony conviction, petitioner responded that he would put everything in the name of Abbott's wife, Jean (Tr. 2069). In December 1979, petitioner prepared articles of incorporation showing that Jean Abbott was the sole owner of the restaurant corporation as well as its president, vice-president, secretary, treasurer and sole director. In petitioner's presence, Abbott forged his wife's signature on the document and backdated it from January 1980 to December 1979 (Pet. App. A7, A28-A29).

On December 11, 1979, petitioner accompanied Jean Abbott to the state Beverage Department office in Jacksonville, where she filled out a personal questionnaire and furnished her fingerprints. During a subsequent visit to obtain a temporary liquor license and the permanent transfer of the license to Abbott's restaurant, she filed documents reflecting that she was the sole officer of the corporation and the only person connected with the business. At that time, the officer in charge of the Beverage Department told petitioner that all correspondence and applications would be mailed from the Jacksonville office to the Tallahassee office for further processing.[2] After Peter Abbott falsely told a Department investigator that he and his wife were divorced, petitioner advised him to state instead that they were separated because the fact of divorce could be verified. Pet. App. A8-A9.

A temporary liquor license was issued in March 1980. Petitioner subsequently told a Beverage Department investigator that Peter Abbott had no interest in the restaurant,

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[2]Mailings from the Jacksonville office to the Tallahassee office were charged in the mail-fraud counts on which petitioner was convicted.

and he later prepared and submitted affidavits executed by the Abbotts to the same effect (Tr. 2134-2135). Subsequently, petitioner also told a Department supervisor that Peter Abbott had no interest in the venture. He later explained to his secretary that, because Abbott was a convicted felon, it was necessary to keep his interest secret. Pet. App. A9-A11.

On April 22, 1980, the Beverage Department denied the license-transfer application. Petitioner subsequently enlisted the assistance of Senator Scarborough in obtaining the liquor license. At Scarborough's suggestion, petitioner also sought the help of Scarborough's friend Onett, who wanted $25,000 for his services but ultimately agreed to settle for $15,000. Peter Abbott authorized petitioner to hire Onett (Tr. 4166). Pet. App. A12-A14. On May 7, 1980, in a recorded conversation,[3] petitioner admitted submitting false statements on the license application and asked Scarborough to exert his influence over the Chief of the Beverage Department to procure the license (GX 27T, at 6, 19; Pet. App. A123). The following day, petitioner filed an amended liquor license application, which adopted a suggestion by Onett (GX 27T, at 29) that Abbott be identified as having an " 'outside interest as accommodation endorser and guarantor without recourse to the corporation.' " Petitioner subsequently told Abbott not to tell his wife that he was " 'paying off' " for the liquor license (Pet. App. A15).

On May 24, 1980, Abbott was videotaped placing $7,500 in an envelope and handing it to petitioner, who was to deliver it to Onett (GX 30, 30T). The scheme to obtain the liquor license terminated in August 1980 when Abbott's restaurant closed and the Beverage Department finally

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[3]On April 11, Abbott had advised an FBI agent of his activities with petitioner; the agent instructed him to continue to follow petitioner's instructions (Tr. 2011). Prior to that time Abbott had acted with criminal intent (Tr. 2151).

rejected the application. Pet. App. A16-A17. A subsequent search of petitioner's law office revealed a personal financial statement of Abbott's showing that he was president and general manager of the restaurant (*id.* at A28).

ARGUMENT

1. a. Petitioner contends (Pet. 9-14) that the mail-fraud statute does not extend to the foreseeable use of the United States mails to transmit documents between state governmental offices in the course of a scheme to defraud. This claim is plainly without merit.

This Court explained long ago, in addressing a predecessor to 18 U.S.C. 1341, that:

> [t]he overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. * * * Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy * * *.

Badders v. *United States*, 240 U.S. 391, 393 (1916). The purpose of the statute is to prevent the federal mails from being used to effectuate fraudulent schemes. *Durland* v. *United States*, 161 U.S. 306, 314 (1896). Accordingly, even where a scheme independently violates state law, it will be within the federal mail-fraud statute when the mails have been used in the course of the scheme. *Parr* v. *United States*, 363 U.S. 370, 389 (1960).

It is therefore not surprising that the courts of appeals have consistently upheld the application of the statute to schemes such as the one here involving the integrity of state and local governments and officials. See, *e.g.*, *United States* v. *Goldstein*, 695 F.2d 1228, 1233 n.7 (10th Cir. 1981), cert. denied, 462 U.S. 1132 (1983) (fraudulent submissions to state medicaid agency); *United States* v. *Grande*, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830 (1980) (collusive

bidding on city contracts); *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir.), convictions aff'd per curiam, 602 F.2d 653 (1979) (en banc), cert. denied, 445 U.S. 961 (1980) (involvement of governor and others in fraudulent concealment of identities of owners of race track); *United States* v. *Castor*, 558 F.2d 379 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978) (fraudulent applications for liquor licenses; mailings were letters from state alcoholic beverage commission to applicants); *United States* v. *Bush*, 522 F.2d 641 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976) (fraud by city employee); *United States* v. *Keane*, 522 F.2d 534 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976) (fraud by city alderman); *United States* v. *States*, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974) (submission of false voter-registration affidavits to city election commission). Petitioner does not cite a single case to the contrary.[4] In view of the unambiguous statutory language and its consistent interpretation in this respect by the courts, petitioner's argument should be directed to Congress, not to this Court.

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[4]Petitioner's reliance (Pet. 12) on *Rewis* v. *United States*, 401 U.S. 808 (1971), is misplaced. In *Rewis*, the Court interpreted an ambiguous statute, the Travel Act (18 U.S.C. 1952), not to criminalize gambling operations merely because they were patronized by out-of-state bettors. The Court adverted to the issue of "sensitive federal-state relationships," but relied for its decision simply on congressional intent and the rule of lenity (401 U.S. at 812). By contrast, it is beyond question that Congress intended the mail-fraud statute to reach all fraudulent schemes facilitated by use of the federal mails (see, *e.g.*, *Durland* v. *United States*, *supra*), and petitioner's scheme clearly falls within the plain language of Section 1341.

Petitioner's suggestion (Pet. 11) that there is something especially intrusive about this prosecution because the mailings were between state governmental offices is meritless: petitioner was charged with causing these mailings as part of his fraudulent scheme. This neither encroached on the powers of the state nor intruded into the manner in which the state conducts its business. Petitioner's argument (Pet. 13) that federal jurisdiction was a matter of "happenstance" ignores the fact

b. Petitioner also argues (Pet. 25-29) that there is insufficient evidence of his participation in a scheme to defraud because he was merely innocently providing legal services to the Abbotts. This claim is wholly lacking in substance and is advanced in total disregard of the factual findings made below.

Petitioner was not, as his argument suggests, indicted for incorporating Abbott's restaurant. Rather, he was charged with participating in a scheme to defraud Florida citizens of their rights to Senator Scarborough's honest and disinterested services and to have Beverage Department officials act on the basis of truthful information, and to obtain a liquor license on the basis of false pretenses (see Pet. App. A21-A22; Appellee's C.A. Br. 75-76).[5] The district court found that "Peter Abbott owned and operated Abbott's Restaurant as the owner-in-fact of the corporation * * * [and] was actively engaged in the management and operation of the restaurant" (Pet. App. A135); that petitioner "knew of these facts at all times material to the allegations of the indictment" (*ibid.*); that petitioner "misrepresented to the Beverage Department * * * that Peter

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that he was advised that application materials would be mailed from one office to another (see page 3, *supra*). His claim (Pet. 14) that, had the mails not been used, the statute would not have been violated merely states the obvious. Cf. *McElroy* v. *United States*, 455 U.S. 642, 658-659 n.22 (1982). We note that petitioner was acquitted on two counts of mail fraud based on letters he sent from his office to the Beverage Department because the government was unable to prove beyond a reasonable doubt that the letters had been mailed rather than delivered by hand (see Appellee's C.A. Br. 78 n.66).

[5]Petitioner's suggestion (Pet. 13) that the federal courts would not be able to determine whether the relevant state statute was violated is belied by the plain language of the law, which refers to the identities of any " 'persons interested directly or indirectly with the applicant in the business' " (Pet. App. A24 n.8). Petitioner does not appear to argue that this statute did not require disclosure of Peter Abbott's interest in the restaurant.

Abbott had no interest, direct or indirect, in the ownership of Abbott's Restaurant" (*id.* at A136); that petitioner "believed that Peter Abbott had a felony conviction" (*id.* at A141); that petitioner "misrepresented and concealed the amounts and sources of monies invested in Abbott's Restaurant" (*id.* at A143); and that petitioner's own "testimony, if believed, would conflict with the testimony of at least ten other witnesses" (*id.* at A148). The court of appeals upheld these findings of the district court (*id.* at A26-A35), agreeing that petitioner "misrepresented to the Beverage Department that Peter Abbott had no interest, direct or indirect, in the ownership of the restaurant" (*id.* at A27) and that petitioner "not only misrepresented Peter Abbott's ownership, he also tried to conceal it" (*id.* at A30).

The courts below properly concluded that petitioner was an active participant in the fraudulent scheme and not a deluded attorney innocently acting within the scope of his professional obligations. See Model Code of Professional Responsibility DR 7-102(A) (1981) ("In his representation of a client, a lawyer shall not * * * (3) Conceal or knowingly fail to disclose that which he is required by law to reveal * * * [or] (5) Knowingly make a false statement of law or facts."). Petitioner's contention to the contrary is simply an attempt to reargue the facts, which does not merit review by this Court. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

2. Petitioner also contends (Pet. 15-24) that the district court erred in requiring him to declare at the close of the government's case-in-chief whether he intended to present an entrapment defense. This claim is frivolous on the facts of this case.

Prior to trial, the government moved to require petitioner and his co-defendants to furnish notice whether they would rely on an entrapment defense. The day before the government rested it renewed the motion, explaining that it needed

to know whether the defense would argue entrapment on the basis of the government's own evidence so that it could present evidence of predisposition before resting (Tr. 3418-3419). The defendants objected on procedural grounds, claiming that the court lacked authority under local rules to require such disclosure (Tr. 3420-3421). The court, however, required them to disclose the information the following day (Tr. 3420). The next day, the government again insisted that the defendants give notice whether they intended to present an entrapment defense based on the government's evidence, explaining that it was not seeking to force them to elect whether to present entrapment evidence in their own case (Tr. 3518). When the defendants stated that they would not present such a defense, the government rested (Tr. 3519). See Pet. App. A50-A54.

Petitioner's contention (Pet. 17) that the court's ruling improperly required him to elect whether to admit the acts charged by relying on an entrapment defense or to waive the defense simply is not presented on these facts. First, petitioner never raised this argument in the district court. Second, the ruling did not require such an election, but only an announcement whether he would present an entrapment defense relying solely on the government's evidence; it was clear that petitioner would still be free to raise the defense based on his own evidence.[6] Third, nothing in the court's ruling suggests that petitioner could not have claimed entrapment based on the government's evidence without admitting his participation in the crime.[7]

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[6]Petitioner's unsupported claim to the contrary (Pet. 22) is simply wrong.

[7]This case therefore does not present the question argued by petitioner (Pet. 18-21) whether a defendant may constitutionally be required to make such an admission in order to raise an entrapment defense on the basis of his own evidence. Petitioner's claim (Pet. 21-22) that the rule permitting an entrapment defense based on the government's evidence without admitting the acts charged was fashioned for

What petitioner actually seems to be asserting (see Pet. 22-24) is the right to capitalize on a procedural trick whereby he could raise the defense of entrapment while foreclosing the government's right to adduce relevant evidence regarding the validity of the defense; this he is surely not entitled to do. Cf. *United States* v. *Salisbury*, 662 F.2d 738, 741 (11th Cir. 1981), cert. denied, 457 U.S. 1107 (1982); *United States* v. *Mack*, 643 F.2d 1119, 1121 (5th Cir. 1981). And to the extent petitioner merely relies upon some claimed loophole in the local district court rules, such an assertion, rejected by both the district court and the court of appeals, plainly merits no further review.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1984

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the first time by the court of appeals in this case is erroneous. At least two earlier Fifth Circuit cases, which are binding precedent within the Eleventh Circuit (*Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc)), had announced the rule. See *United States* v. *Greenfield*, 554 F.2d 179, 182 (5th Cir. 1977), cert. denied, 439 U.S. 860 (1978); *Sears* v. *United States*, 343 F.2d 139, 143-144 (5th Cir. 1965).

[8]In any event, petitioner never did raise an entrapment defense, and no predisposition evidence was offered by the government to rebut one. The defense would of course have been futile in view of the fact that the fraudulent scheme was well under way before Abbott contacted the authorities. See pages 2-4 & note 3, *supra*.

DOJ-1984-11